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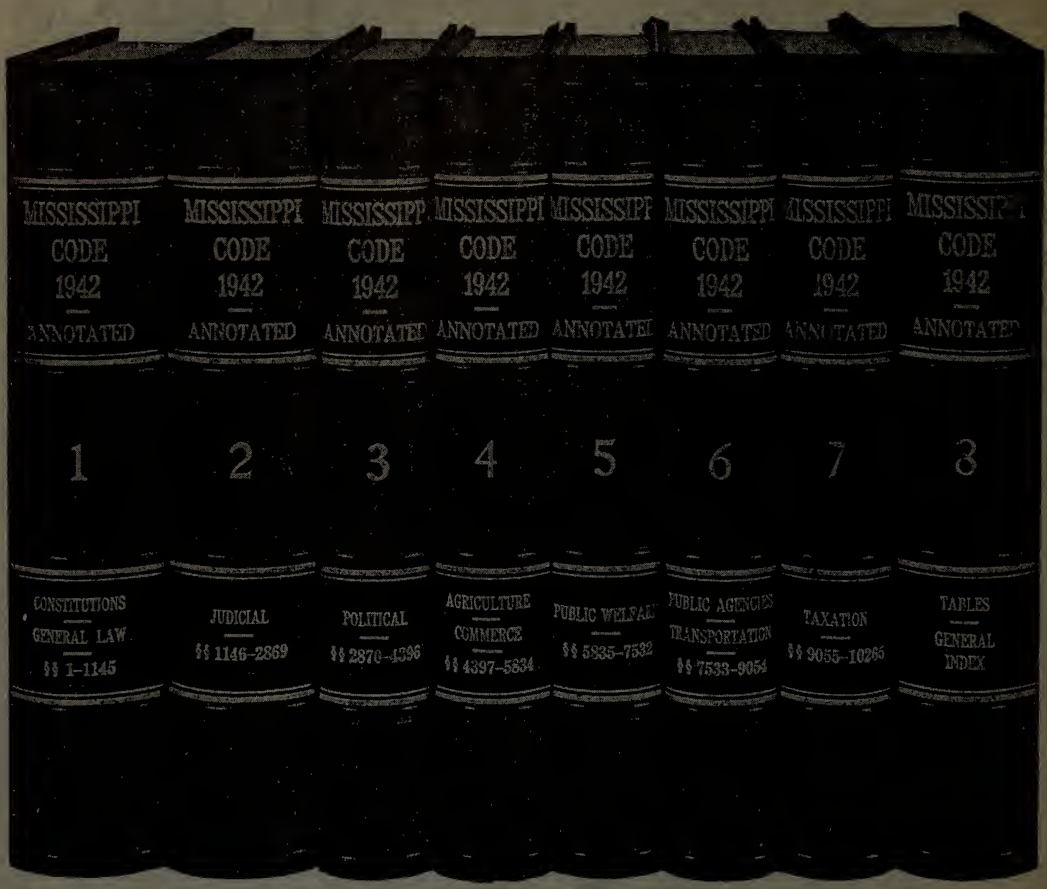

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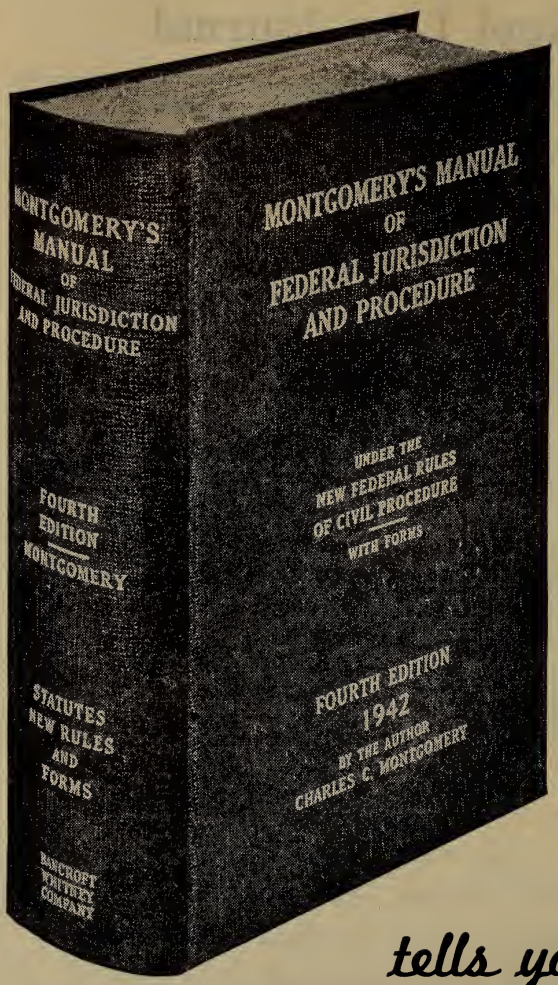

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PRESUMPTIONS IN CRIMINAL CASES*

Julian P. Alexander†

The function and force of presumptions in criminal cases is similar to that in civil cases. Since, however, a presumption must be strong enough to make out a prima facie case, it must and does adduce proof, either of guilt of the offense or of an element thereof, beyond reasonable doubt.

One need not rehearse general principles applicable to the use of presumptions,[1] but may profitably question the recognition traditionally given to certain inferences of guilt. The confusion incident to the use of "inference" and "presumption" as synonymous has been adverted to in a prior article. Repetition may be justified that a presumption is properly an inference which the law has so far adopted as a sane generality that it established it as a rule of universal and compulsory application. Those established by statute differ only in their genesis.

Since inferences are logical deductions of one fact from proof of other facts, their function as evidentiary material is chiefly argumentative, and as such are solely for the jury's appraisal once the case has passed the judge. They are not fit subjects for comment in instructions and therefore presumptions, which are but regimented and recognized inferences, are equally improper in instructions. They are solely for the use of judges. Yet the practice, 1) of accepting certain inferences as legal presumptions, and 2) of incorporating them into instructions, will be examined.

The Myth Of Malice

It is early learning of the student of law that murder must be committed "with malice aforethought." Indictments have been scanned and gleefully seized upon as defective when, despite an array of legal adverbs, there was an omission specifically to charge malice.[2]

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*This is the second and concluding article by the author dealing with the subject of presumptions. The first article is found at 17 Miss. L. J. 1.

†Associate Justice, Supreme Court of Mississippi.

[1]See *Presumptions: Their Use and Abuse* (1945) 17 Miss. L. J. 1.

[2]Buchanan v. State, 97 Miss. 839, 53 So. 399 (1910), is a case in point. The language of the opinion is with deference believed to be unfortunate. The supporting cases do not justify the holding that the omission of "malice" in the indictment

Now, malice in a non-technical sense is not at all necessary in murder. Our statutory definition of wilful murder is "The killing of a human being, without authority of law by any means or in any manner . . . (a) when done with deliberate design to effect the death of the person killed . . ."[3] Indeed if there be very noticeable actual malice, it is apt to be construed as heat of passion and classed as manslaughter.[4] The more malice, the less murder. Manslaughter is homicide without malice, yet when malice detonates in an outburst of passion, it becomes manslaughter. There must be a ready shifting from the popular to the technical sense to save it from inconsistency.

Although our purpose is to decry the use of presumptions in instructions, the question whether malice is presumed at all is a prior inquiry. But above all is the basic question whether under our law malice is a necessary ingredient of murder. A negative answer to the last query would end the matter.

That malice is a necessary ingredient of murder seems firmly fixed in our minds if not in our law. "Malice aforethought" is so established as part of the formal trappings of murder that, divested of the identifying vestment, murder is not recognized. Indictments have been quashed and cases reversed because a deliberate intent to kill was not arrayed in these technical habilments. Yet since Hutchinson's Code of 1848, no statutory definition of murder has required either malice or malice aforethought. It is true that in deference to ancient verbiage we early held that malice would be "presumed" from an intentional homicide.[5] In other words, by those devoted to common law formularies, it was seen as automatically imported into the homicidal act and thus retained in our jurisprudence in deference to its ancestry. Its presence, still deemed essential, was accounted for as being implicit not only in the unexplained

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is reversible error. Malice *eo nomine* is not under our statute an ingredient of murder. Reliance was placed upon Jesse v. State, 28 Miss. 100 (1854). Yet this was a case of arson in which malice is an ingredient. Other cited cases concede that "equivalent words" are sufficient. Its force is weakened by Wexler v. State, 167 Miss. 464, 142 So. 501 (1932). See HOLMES, THE COMMON LAW (1881) 52.

[3]MISS. CODE ANN. (1942) § 2215. As late as 1936 in Butler v. State, 177 Miss. 91, 170 So. 148 (1936), our court was reversing cases where "malice aforethought" was omitted from instructions to juries who would have to be wiser than our judges if they could agree upon its definition. See dissentient views in *Ex parte* Wray, 30 Miss. 673 (1856).

[4]Legal malice and heat of passion can not co-exist. WHARTON, CRIMINAL LAW (12th ed. 1932) § 426; WARREN, HOMICIDE (Perm. ed.) 270. See Butler v. State, 177 Miss. 91, 170 So. 148 (1936); Smith v. State, 58 Miss. 867 (1881).

[5]McDaniel v. State, 8 S. & M. 401 (Miss. 1847); Green v. State, 28 Miss. 687 (1855).

act but in the allegation of deliberate design.[6] This is all that our statutes have ever required.

However, assuming a necessity for its use properly to season the homicide with murderous savor, it is kept alive not only by this presumption but also by a so-called presumption arising out of the use of a deadly weapon.[7] Now "malice" has been defined and refined by the courts and text writers. Although repeatedly conceded as synonymous with intent, it is retained as *sui generis* and has undergone further refinements as express and implied malice.[8] Despite the general concession that it implies no ill-will, hatred or malevolence toward the victim, such concession is a secret of the judges and the juries are continually told that malice must be shown, and prosecutors that it must be alleged. Jurors know only one kind of malice and their definition includes much that the technical term excludes. In other words "malice" does not mean malice; it means intent. However, the debate goes on whether it is a presumption or an inference[9] and whether it is express or implied. To those troubled with the problem as to how long this malice must be "aforethought," the courts repeatedly answer that it need pre-exist for only a moment. If it operate to motivate the act, it must precede it even as intent by definition and of necessity must precede action.[10]

As already intimated, if the jury believe the defendant was seized of sufficient malice as they understand it, they will acquit the defendant of murder in favor of manslaughter. By the same token, "cold-blooded" murder must have malice, if the notion is to persist.[11] Infanticide, mercy killings, and criminal inadvertence, utterly devoid of actual malice, become infused with it whether or not. In fine, the time has come to recognize that technical malice as a necessary ingredient is vestigial and confusing.

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[6]Dye v. State, 127 Miss. 492, 90 So. 180 (1922); McDaniel v. State, 8 S. & M. 401 (Miss. 1847). The phrase is preserved in Walker v. State, 188 Miss. 177, 189 So. 804 (1939), but obviously as a synonym for premeditation.

[7]See note 19 *infra* and accompanying text.

[8]*Ex parte* Wray, 30 Miss. 673 (1856); Anthony v. State, 13 S. & M. 263 (Miss. 1850). See note 17, *infra.*

[9]No doubt the confusion as to what is meant by "malice" and the erroneous assumption that it must be proven have led to disagreement whether it is supplied by a presumption or as an inference. It was finally called a mere inference in Busby v. State, 177 Miss. 68, 170 So. 140 (1936), where, although the cart and the horse were interchanged in the following language, "The use of a deadly weapon is but an inference of fact as to an intent to kill and is not a presumption of law," yet two truths emerged from the tangle—1) that there is no presumption; and 2) that the evidence supplied is of intent to kill. Further progress would be shown by abandoning malice except as evidence of intent (and not as in *Busby v. State*, that intent is a necessary part of malice) and retaining the presumption of intent from deliberate homicide.

[10]Mills v. State, 17 So. (2d) 215 (Miss. 1944).

[11]Holmes, The Common Law (1881) 52, 53.

The early cases[12] spoke correctly of the inference of an intent to kill from the deliberate use of a deadly weapon. Intent, provable almost invariably by inference, is held to be so proved by the deliberate killing, and the presumption that it is murder is enough to make a prima facie case for the state. Even as there was no need for actual malice, there is no need for either a presumption or inference thereof. Therefore, no instruction should include any presumption of malice because 1) there is no such presumption; 2) if there were it is a presumption of an unnecessary and misunderstood ingredient; and 3) no presumption ought to be mentioned in instructions.[13] The fluctuations of our decisions upon this point are but the inevitable result of building any house upon unstable sands.[14]

It is well enough for antiquarians to conserve the subtle implications of legal malice.[15] Yet in the administration of the law, we must not eschew the practical and the real. Jurors know malice only in its popular sense. Our courts have, since our first statute defining murder, insisted that "deliberate design" is synonymous with "malice aforethought." Why not, then, in murder cases abandon all refinements as to the term malice or indeed the word itself?[16] It is trouble enough that the simpler, safer word "intent" must itself submit to further dissection.[17]

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[12]Jesse v. State, 28 Miss. 100 (1854); Jeff v. State, 39 Miss. 593 (1860). Yet because malice was still deemed a technical element and somehow distinct from intent, the same result was reached by holding that a deliberate homicide is presumably malicious and murder. Haynes v. State, 34 Miss. 616 (1857). It would seem to be simpler to hold that a deliberate homicide (without authority of law) *is* murder. See ARCHBOLD, CRIMINAL PLEADING AND EVIDENCE (22d ed. 1900) 315.

[13]A possible exception is suggested, *infra,* under Summary, paragraph 7. See *infra,* note 29. Wyckoff v. Mutual Life Ins. Co., 38 Ore. 379, 147 P. (2d) 227 (1944), and note by Prof. E. M. Morgan, (1944) 23 ORE. L. REV. 269. Our latest case is Bridges v. State, 19 So. (2d) 738 (Miss. 1944), decided November 13.

[14]Refer to Mississippi Digest, Homicide, Key No. 146. The confusion from an attempt to embody the presumption in instructions is shown in People v. Murguia, 6 Cal. (2d) 190, 57 P. (2d) 115 (1936).

[15]Profound discussions abound. Justice Holmes traces it back to the canonical "malitia" and disavows for it any necessary implication of motive. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES (1943) 77, 99. See ARCHBOLD, *op. cit. supra* note 12 at 315. It is called a technical term, indicating only intent, unlawful purpose, or deliberation, in SALMOND, JURISPRUDENCE (7th ed. 1924) § 135, and 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926) 435.

For an illuminating and concordant discussion, see Perkins, *A Re-examination of Malice Aforethought* (1934) 43 YALE L. J. 537, where the phrase is described as "a bit of juridical shorthand" that "is not a key which unlocks mysteries but a label to be attached after the secret is solved."

[16]Reference is only to the crime of murder. A different situation is presented in cases of arson, malicious mischief, criminal libel and the like, where malice is a logical and legal ingredient. Classifications of malice are deplored by WHARTON, CRIMINAL LAW (12th ed. 1913) § 145.

[17]See HOLMES, THE COMMON LAW (1881) 53, where the subject matter of the text immediately following is also discussed. The classifications of malice, as in Motley v. Smith, 172 Miss. 148, 159 So. 553 (1935), are deemed fallacious by WHARTON, CRIMINAL LAW (12th ed. 1913) § 155.

Intent implies deliberation. Intent activated by the act completes the crime. It is immaterial whether the intent is infected with or necessarily provable by malice or malevolence. Provable circumstantially, or by inference, it is supplied by the principle that one is presumed to intend the natural and probable consequences of his acts. Infanticide, as stated above, is murder whether with or without malice. It is murder whether done deliberately or purposefully, or by exposing the infant to hostile elements foreseeably calculated to cause death. The latter situation is murder under our statute[18] without dependence solely upon such presumption.

By insisting in indictments that as to the victims there be shown "malice" toward all, we have, as to the defendants, acted with unintentional charity to some. We ought to abandon "malice" and rid ourselves of all the perplexities that follow in its train.

In *Winchester v. State*[19] the Court held that malice could not exist without deliberation, and thus imported into the opinion the truth that it is the intent that is important. It may have been more exact to say that deliberation may exist without malice. However, the Court still clung to the acceptance of a presumption of malice but held that "it must yield to the evidence." It is submitted that presumptions do not "yield to the evidence" but yield or disappear when the duty of producing evidence is imposed by the judge's ruling that a prima facie case has been made.

The Presumption of Malice From the Use of a Deadly Weapon

The usual phrasing has been that malice is presumed from the deliberate use of a deadly weapon. Although fashioned out of material substantial enough to withstand the ravages of time, this formula does not hold water. An electric chair is unquestionably a deadly device and is deliberately used. There is intent but not malice. Lacking "authority of law," its use would be murder. In the first place, as stated, it is the intent which is inferable and which alone is sufficient. Secondly, such intent is inferable from the homicide whether committed with a deadly weapon or not. Of course the inference is stronger with the jury when a deadly weapon is used. But we are not discussing the weight of evidence generally but those evidential patterns which are solely for the use of the judges, and are called presumptions.

Moreover, the traditional formula is not always just or logical. The nature or size of the person using the weapon, the manner in which used,

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[18]Miss. Code Ann. (1942) § 2215, ¶ (b) provides for cases where the homicide is an incident of an unlawful act.

[19]163 Miss. 462, 142 So. 454 (1932).

the condition of the parties, and the attendant circumstances are all relevant factors.[20] An attempt to compile a list of weapons accepted as "dangerous" is futile.[21] If a weapon kills, it is deadly beyond cavil. If it be potentially deadly, the circumstances and the manner of its use must be shown. The natural probability of the consequence of death justifies invoking a presumption of intent from the use of a weapon reasonably capable of producing death. Yet since proof of the homicide furnishes an inference of intent to kill sufficient to make a prima facie case, why should the courts further elaborate the presumption? When the defense offers a reasonable rebuttal the presumption vanishes, and thenceforward the instrumentality used is purely material for argument.

Why maneuver to a conclusion of a prima facie case by reasoning that a homicide with a deadly weapon is presumptively malicious;[22] next that every unexplained homicide is presumably malicious;[23] next that malice means intent and intent is presumed from an intentional killing;[24] then to the conclusion that every such homicide is therefore prima facie murder?[25] This leads to such conflicting decisions as that such presumption yields to the evidence[26] and yet that a jury may be instructed upon the presumption.[27]

It is not unreasonable to conclude that the only proof needed is one of an intent to kill and an acceptance of a presumption of such intent from the fact of the homicide.[28] Whether it is justifiable or excusable is a matter of defense. If the presumption thus arises there is no need to complicate the matter with "presumptions" that only strengthen or impair the adduced fact.[29] There is probably no harm consequent upon adoption of a presumption from the use of a deadly weapon except that it adds to the increasing list of presumptions one which is unnecessary and unsafe. Moreover, it merely elaborates a simpler and included

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[20]Griffin v. State, 18 So. (2d) 437 (Miss. 1944); Daniels v. State, 163 Miss. 245, 140 So. 724 (1932); Blain v. State, 17 So. (2d) 549 (Miss. 1944). RESTATEMENT, TORTS (1934) § 63 (d).

[21]MISS. CODE ANN. (1942) § 2079 attempts a classification.

[22]Johnson v. State, 140 Miss. 889, 105 So. 742 (1925).

[23]Jones v. State, 178 Miss. 636, 174 So. 546 (1937); Haynes v. State, 34 Miss. 616 (1857); McDaniel v. State, 8 S. & M. 401 (1847).

[24]Barcus v. State, 49 Miss. 17 (1873).

[25]Wright v. State, 162 Miss. 494, 139 So. 869 (1932); Green v. State, 28 Miss. 687 (1855).

[26]Patty v. State, 126 Miss. 94, 88 So. 498 (1921).

[27]Holmes v. State, 151 Miss. 702, 118 So. 431 (1928).

[28]Of course the killing by the defendant must be proven. It must be without authority of law but the fact of legal authority is defensive. No one need question the requirement of an allegation that the homicide be unlawful and felonious. Yet in some future and more realistic era "wilful" or "deliberate" will be found sufficient. It is unlawful and felonious to kill anyone wilfully and without authority of law.

[29]See *supra* note 9.

presumption which makes the nature of the weapon used as irrelevant—for the purposes of passing the judge—as the color of the victim's eyes. The erroneous assumption that actual malice had to be adduced led to its acceptance. A fictitious necessity was the mother of this invention. Only the liquidation of such parent will be a guarantee against its illegitimate offspring. If accepted presumptions have no place in instructions, those that are spurious should not ask admittance.[30]

That malice in a popular sense is not implied may be shown from a consideration of civil homicide cases. If malice were presumed, the judge could always, where there was liability, allow punitive damages without any evidence thereof. It is true, of course, that in actions for wrongful death where the act amounts to murder, wilfulness or wantonness will be shown. Since exemplary damages are allowable when the conduct is "tantamount to wilfulness," they are usually proper in such cases. Here the intent is provable by a presumption. Yet, if aggravation is to be grounded upon actual malice, it should be proved as any other fact. As shown above, even though murder is to be presumed, actual malice is not necessary and ought not to be imported into the case by such presumption. In civil cases both actual malice and justification are affirmative burdens.[31]

The foregoing discussion has been directed chiefly to homicide cases. Where the charge is an assault or assault and battery with intent to kill and murder, or an attempt to murder, there is absent the fact of death which is conclusive evidence that the means used was deadly. The intent is not here referable to the fact of a proven, deliberate killing and must be inferred from the circumstances. In this connection the weapon or means used is relevant and under the Mississippi Code of 1942, Section 2011, the means used must be "likely to produce death." But here again the inference from the deliberate use of such means, if accepted as a legal rule or presumption, is to be addressed solely to the judge in appraising a prima facie case.[32]

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[30]See *supra* note 13, where a possible exception is suggested. Gillespie v. State, 96 Miss. 856, 51 So. 811 (1910), seems to furnish an example. Compare the situation presented by Williamson v. State, 191 Miss. 643, 4 So. (2d) 220 (1941). In the interest of justice as well as of other members of a household, the jury should be apprised of the legal responsibility of the head of the house and if the presumption against him is not rebutted it could properly be embodied in an instruction.

[31]In an action for wrongful death, malice need not be shown, and if sought as a basis for exemplary damages, is provable as any other fact. See Estate of Nelson, 191 Cal. 280, 216 Pac. 368 (1923); Notes (1911) 33 L. R. A. (N. S.) 841, L. R. A. 1918A 359.

[32]Strictly speaking, there is no genuine presumption of a specific intent, such as characterizes this offense. See Perkins, *A Rationale of Mens Rea* (1939) 52 HARV. L. REV. 905. An inference of fact (so-called in Busby v. State, 177 Miss. 68, 170 So. 140 (1936), note 9 *supra*) naturally exists and is sufficient for a prima facie case.

In this connection *Walker v. State*[33] is interesting. Although still intrigued with the term "malice" it is helpful in forecasting an abandonment of presumptions after the case has passed the judge. Our latest pronouncement is *Bridges v. State,* decided November 13, 1944.[34]

THE PRESUMPTION FROM RECENT POSSESSION OF STOLEN GOODS

It is a logical inference that one found in recent possession of stolen goods is the thief provided that upon opportunity he fail or refuse to make a prompt and reasonable explanation thereof. It is too often lost sight of that the inference stems chiefly from the failure promptly to explain rather than from the bare fact of possession.[35] Here the inference has the same rationale as that furnished by the failure to call an available and informed witness,[36] yet partakes more of the quality of a presumption in that it adduces not merely a vague inference of prejudice but supplies a definite fact, to wit, guilt.

This "presumption," that the possessor knew of the theft, was a gradual and almost imperceptible accretion upon the inference of guilt of theft from recent possession. While respectable authority sanctions the view that, if there be ever any such presumption it ought to apply to both charges,[37] the presumption of theft is the more logical and imports into the case a smaller burden of facts than a presumption of knowingly receiving. Moreover, conscious aid in disposing of stolen goods may often sustain a charge of theft.[38] It ought never to have attained the rank of a presumption. The judicial debates as to the weight to be given the inference from possession led to concessions that the jury may be instructed that they "may consider" or "may infer" guilt. Such expressions at once disprove the status of the inference as a presumption and reveal their own condemnation as mere judicial advice or argument.[39]

Into our own jurisprudence the principle was born a cripple. It should not have been encouraged to hope that it would attain the vigor and stature of a mature presumption. In *Sartorious v. State*[40] it was held

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[33]146 Miss. 510, 112 So. 673 (1927).
[34]19 So. (2d) 738 (Miss. 1944).
[35]Crowell v. State, 195 Miss. 427, 15 So. (2d) 508 (1943).
[36]See prior article, *Presumptions: Their Use and Abuse* (1945) 17 MISS. L. J. 1.
[37]9 WIGMORE, EVIDENCE (3d ed. 1940) § 2513.
[38]Devine v. State, 132 Miss. 492, 96 So. 696 (1923). Ample authority sustains the view that if any presumption exists, it is solely that the defendant is the thief. Sartorious v. State, 24 Miss. 602 (1852); Crowell v. State, 195 Miss. 427, 15 So. (2d) 508 (1943). Hence, such deduction even as an inference ought to be so restricted.
[39]See prior article, *Presumptions: Their Use and Abuse* (1945) 17 MISS. L. J. 1, notes 17, 35. Wigmore states there should be no such presumption. 9 WIGMORE, *op. cit. supra* note 37, § 2513.
[40]24 Miss. 602 (1852).

that recent possession of stolen goods is not a circumstance from which it could be "legally inferred" that the possessor unlawfully received them. The presumption, if any, would be that he was the thief. What sort of presumption the court had in mind is deducible from the following language: "but it is conceded, that there might be a case where recent possession of stolen goods, united with other circumstances would warrant the presumption of a felonious reception, and not of a larceny of the goods."[41] The court could have not meant more than a permissible inference which is nothing but a test of relevancy. Presumptions, strictly so-called, are compulsory, uniform, and always work. No court should accept a rule binding upon itself which it can not define. A harassed and harassing life could well have been forecast for this abortive "presumption."

The presumption now twenty-two years of age sauntered into our court in *Davis v. State,*[42] where it was ushered into the jury room through instructions. It was found incapable of justifying its presence. Satisfactory answers were not forthcoming as to what circumstances gave it life, how vigorous it was, how long it could survive after the theft and what sort of explanation by the possessor would overcome it. The Court bewailed that "it is not far from correct to say that on no subject are the decisions of the courts and comments of law writers as various and unsettled as on the one involved herein." The court cited eminent text writers who expressed opposite views as to the strength of the "presumption." It was found necessary to classify circumstances as to time and the nature of the stolen articles. Cases were cited where the presumption died after a lapse of three months[43] and later, after three weeks.[44] But the latter case involved and became involved in a consideration of the reasonableness of defendant's explanation and his general deportment.

It would seem that the Court would have been put upon notice of the perplexities which lay ahead. Its own doubts were thus expressed: "Precisely how much the presumption is one of fact and how much of it is one of law may not be quite plain as a matter of authority, though we have seen that as a matter of legal principle it is all of fact for the jury." Since, as heretofore attempted to be shown, presumptions are all of fact, or more properly of facts, and are also presumptions of law, in the sense that they are legal rules, all attempts to cabin them into a single category is to ignore the distinction between how they serve and whom they serve. The Court was here troubled with the extent to which it could or ought

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[41] *Id.* at 610.

[42] 50 Miss. 86 (1874). It was held that recent possession is slight and never conclusive evidence of guilt in Stokes v. State, 58 Miss. 677 (1881).

[43] 26 Miss. 247 (1853).

[44] 30 Miss. 653 (1856).

to interfere with the jury's independent appraisement of the entire circumstances.

A symptom of unsoundness is discernible in the prolonged discussions as to how strong is the "presumption." This inevitably requires a weighing of each case and a separate appraisal of the circumstantial evidence, involving such factors as above referred to. This has led to a virtual holding that each case must stand upon its own bottom, whereas a true presumption always has a fixed and stable basis. Likewise it requires a pondering of each set of circumstances to test whether the "presumption" is strong or weak, whereas all presumptions are strong. That is to say, they are strong enough to sustain a prima facie case. Having held up the prosecution's case thus far, it abandons the field but leaves the inference, which gave it life, to fight its own way against the explanatory or defensive proof of the defendant. These inferences are weak or strong according to the jury's estimate. If the facts are not strong enough to make out a prima facie case of guilt, it is no presumption. When it does this, it thenceforward ceases to be a presumption since its control is only of the judge and the case is thereafter in control of the jury insofar as the weight of evidence is concerned.

We need not pursue this phase further except to say that most of the confusion followed the use of the "presumption" in instructions. Whether there ought to be or can be an accepted and definitive presumption at all is doubtful. If the word "recent" were of definite import, it could be adapted to the formula $A+B=C$. Yet since the opportunity to make an explanation and the reasonableness thereof are important factors, even recent possession is not enough. It is believed that the prosecution should be content to leave the matter to the judge to determine whether guilt is shown prima facie.[45] Since the judge has no fixed rule to control him, he must weigh each case and define "reasonableness" and "recent" as unquestionably relevant incriminatory circumstances. After our Court had on occasion held both that there was a presumption[46] and that there was none,[47] and had attempted to restrict it to an inference of guilt of the theft and later to expand it to an inference of guilty knowledge, the matter was finally set to rest in *Crowell v. State*,[48]

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[45]Apt analogy may be seen in the doctrine of *res ipsa loquitur* where the principle is invoked by the judge *pro re rata* according to the circumstances. He has no legal yardstick available. A prima facie case is to be adjudged by standards of weight of relevancy as in cases where no presumption exists. See prior article, *Presumptions: Their Use and Abuse* (1945) 17 Miss. L. J. 1, note 52 and accompanying text.

[46]Wade v. State, 175 Miss. 434, 167 So. 617 (1936); Sanford v. State, 155 Miss. 295, 124 So. 353 (1929); Autman v. State, 126 Miss. 629, 89 So. 265 (1921).

[47]Harper v. State, 71 Miss. 202 (1893). See Patterson v. State, 144 Miss. 410, 110 So. 208 (1926).

[48]195 Miss. 427, 15 So. (2d) 508 (1943).

where even the compromise of "advising" the jury that they "may consider" such circumstance or that it is "a strong circumstance" was belatedly but commendably discredited.

The Presumption From Flight

The inference of guilt implicit in flight by the defendant from the scene of the crime or shortly thereafter is logical and therefore relevant. When it is attempted to conform it to the presumptive formula, $A+B=C$, it is seen that there is a missing factor. It is expressed thus: A (the flight of accused) $+$ B (for which there is no present element) $=$ C (guilt). It can not be said that B represents the fact that defendant is the accused, for our indictment is no evidence of guilt. If B represents the possession of a bloody knife or a smoking gun, then C is better justified as a logical and condemnatory inference. It is seen at once that flight of itself can never be sufficient.[49]

It may bolster other incriminating circumstances but such quality is not sufficient. The need for the presence of other circumstances discloses its instability as a basis for a presumption. Ofttimes the courts seek to dispel confusion by a mere holding that each case must depend on its own circumstances. It ought to have been realized that to dispel the doubt, we should dispel the "presumption."

Even as flight is a relevant circumstance, so the vacillations of our own Court upon the subject may as well be presumptive evidence that the bases of the "presumption" are unstable. As upon the subject of possession of stolen goods, the Court has upheld such presumption,[50] and repudiated it,[51] has deemed it consistent with guilt, and consistent with innocence.[52] A hopeful sign of its disintegration is seen in the demeaning of its status to mere judicial admonition that the jury "may consider it." The long arm of tradition reaching out from the body of ancient procedure where judges deemed it necessary and advisable to "instruct" the juries upon the weight of evidence and to "warn" them of prejudicial factors has extended down to the present. A restrained irreverence has occasionally been manifested by delicate slaps upon its wrist to discourage its intermeddling with the freedom of juries and its disarranging of modern patterns. The only solution is to strengthen the barrier of Section 1530 of the Mississippi Code of 1942. So that the deductive process of the jury may not be disturbed by special emphasis,

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[49]Howard v. State, 182 Miss. 27, 181 So. 525 (1938).

[50]Sims v. State, 164 Miss. 16, 142 So. 468 (1932); Tatum v. State, 142 Miss. 110, 107 So. 418 (1926).

[51]Howard v. State, 182 Miss. 27, 181 So. 525 (1938).

[52]*Ibid.* The most recent use of admonitory instructions is found in Ellis v. State, 18 So. (2d) 464 (Miss. 1944), where the state's instructions led as usual to a counter instruction.

we should retain the circumstances of flight as relevant but leave the jury unhampered in its judgment as to how relevant it is. Any foundation fashioned of such material crumbles upon any attempt to erect a sound presumption thereon.[53]

The Presumption of Innocence

Only a courageous crusader would lay hands upon this sacrosanct presumption. Yet it was born on a day when the defendant was forbidden to testify. It is not a genuine presumption and therefore not being adapted to the formula, $A+B=C$, it soon got out of hand. It is believed that the admonition to the jury to yield only to proof of guilt beyond all reasonable doubt secures to the defendant ample protection. Nor is it necessary as a procedural device to place the initial burden upon the state. Such burden is always upon him who seeks to set in motion the judicial processes of the court.[54] Timorous of incurring a charge of radicalism, the writer is not advocating its abolition, but he is emboldened to cast a skeptical slur upon its standing among true presumptions and to doubt whether its product of justice has equalled the sum of its confusion.[55]

Statutory Presumptions In Criminal Cases

Demonstration has been attempted that a conclusive presumption is an anomaly.[56] Such are substantive rules of law and therefore there can be no conclusive presumptions of guilt. Even rebuttable presumptions

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[53]That there is no presumption of guilt from flight is shown by 9 Wigmore, Evidence (3d ed. 1940) § 2511 (a). See also 23 C. J. S., Criminal Law, § 1185.

[54]After all, this "presumption" is but expressive of the maxim, *semper praesumitur pro negante*. The burden is always upon the "actor" or him who seeks to set judicial processes in motion. Archbold, Criminal Pleading and Evidence (22d ed. 1900) 315; Thayer, A Preliminary Treatise on Evidence (1898) 552. See Carr v. State, 192 Miss. 152, 4 So. (2d) 887 (1942).

[55]See Alexander, *The State Also is Entitled to a Fair Trial* (1940) 12 Miss. L. J. 265, 276; Carr v. State, 192 Miss. 152, 4 So. (2d) 887 (1942). Its function in compelling belief of guilt beyond reasonable doubt may find echo in the probable absence of such presumption when the case is cast in a civil action. *Cf.* Redmond v. Marshall, 162 Miss. 359, 137 So. 733 (1931). After conviction, the defendant is in fact presumed to be guilty. This is a true presumption. A (the conviction) $+$ B (by a competent court) $=C$ (guilt). Respectable authority supports the view that the presumption of innocence is merely a device to emphasize and enforce the necessity for proof of guilt beyond all reasonable doubt and that an instruction embodying this necessity is sufficient. See State v. Kennedy, 154 Mo. 268, 55 S. W. 293 (1900). Thayer, *op. cit. supra* note 54 at 551 *et seq.* Confusion is indicated by 9 Wigmore, *op. cit. supra* note 53, § 2511. The absence of such "presumption" in a civil case is significant since proof of liability need not be shown beyond reasonable doubt. It is then revealed in its true light as an assumption of rightful conduct. See *supra* note 30, and text; also Redmond v. Marshall, 162 Miss. 359, 137 So. 733 (1931).

[56]See prior article, *Presumptions: Their Use and Abuse* (1945) 17 Miss. L. J. 1, note 10.

must comport with reason, logic and experience.[57] We have many statutory presumptions of prima facie guilt.[58] All that need be said of them is that they too, are solely for the judges and, as frequently urged herein, serve their complete function when they have carried the state's case past the trial judge.[59]

When The Presumption Is Met In Criminal Cases[60]

As adverted to, all presumptions in criminal cases must and do adduce, prima facie, proof of guilt beyond reasonable doubt. The burden of procedure thus shifted to the defendant must be met. When is this accomplished? There is no difficulty of solution where the issue is that raised by a plea of not guilty. The burden of persuasion remains upon the state and the proof of guilt whether adduced by presumptions or by direct evidence must after attack by the defendant, rise above the height of reasonable doubt.

It is in cases where the defendant has an affirmative defense not implicit in the plea of not guilty that uncertainty has seeped in. If the defendant plead *autre-fois acquit* or *convict,* he has an affirmative burden which must be pleaded[61] and proven by sufficient evidence. Yet in

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[57]Tot v. United States, 319 U. S. 463 (1943).

[58]Proof of no deposit "prima facie evidence" of intent to defraud, Miss. Code Ann. (1942) § 2153; sale of liquors "presumptive evidence" of guilt of occupant, *id.* § 2626; certain circumstances "prima facie proof" of intent to defraud landlord, *id.* § 7155; chemist's certificate "prima facie evidence" of facts stated, *id.* § 7128; tax collector's list of delinquents prima facie evidence of non-payment, *id.* § 9920; operation of non-resident car "prima facie evidence" of intent to violate license tag laws, *id.* § 9399; possession of burglars' tools "prima facie evidence" of criminal intent, *id.* § 2044; officer, etc., acting after suspension "deemed to have acted in violation" of franchise act, *id.* § 9327; failure to furnish memo of futures contract "prima facie evidence" of illegality, *id.* § 30; excessive speed "prima facie evidence" of imprudence, *id.* § 8176; exceeding established speed "conclusive evidence of unsafety," *id.* § 8179. This list is probably not exhaustive.

[59]The relevant inferences inherent in these presumptions of course remain for the estimate of the appellate court in adjudging whether the verdict is sustainable by the evidence. It is in this connection that opinions frequently employ the word "presumption" as meaning a permissible deduction. Where there is no rebuttal evidence, even the appellate court may apply the legal presumption in weighing the evidence. In Bills v. State, 105 Miss. 585, 62 So. 647 (1913), both the state and the defendant got instructions upon a statutory presumption. The opinion is not helpful upon the right to use the presumption in instructions. The case went off upon the point that the defendant's instruction was inaptly drawn. The Attorney General conceded that the presumption was probably out of the case in view of the rebuttal yet left the question to the court to decide.

[60]The caption is a concession to popular expression. To be exact, presumptions are not "met"; they are not evidence. The evidence they supply is that which must be met. See Thayer, *op. cit. supra* note 54 at 563. The simplest rendering of the problem is that only evidence needs rebuttal and rebuttal is only by evidence. By excluding "presumption" from the statement, we leave factual issues in the jury's hands to be decided as if there were no such things as presumptions.

[61]Tanner v. State, 18 So. (2d) 300 (Miss. 1944).

its last analysis this is not an exception, since the issue is not the guilt of the defendant in the instant case.[62]

Once we accept the truth that the burden of persuasion never shifts from the state, it is seen that all affirmative burdens on the defendant are burdens of proceeding. Beyond our inquiry are the burdens of proof involved in diversionary or collateral issues arising as to the admissibility of dying declarations, confessions, and in motions as for change of venue or special pleas in bar where issues of fact are raised.

It can therefore be safely stated that upon the issue of guilt *vel non,* no defense imposes upon the defendant an affirmative burden except to go forward and adduce evidence. Indeed, this burden can be ignored if the defendant choose to risk his case upon an attack upon the credibility of the state's witnesses or the sufficiency of its evidence or the caprice of the jury. The measure of the defendant's burden is solely to create a reasonable doubt of his guilt.

The foregoing principle has not clearly emerged from our decisions. For example, it has been repeatedly held that Section 2079 of the Code of 1942 imposes upon the defendant an "affirmative burden" of justification.[63] Now justification or excuse in homicide is an affirmative burden in the sense that the state need not negative exceptions, but it is a burden measured only by the duty to create a reasonable doubt.[64] Yet in decisions under the section referred to dealing with the carrying of concealed weapons, the Court has been perhaps too much impressed by the fact that a succeeding statute (Section 2081) provides that the burden of proving the listed defenses shall be upon the accused.

We may select from the cases cited in the foregoing note some which illustrate the ravages of an indecision as to whether this statutory burden was one of persuasion or of proceeding. In the *Fife* case the Court held bad an instruction for the defendant which compelled the prosecutor to show beyond reasonable doubt that the defendant 1) carried a pistol and 2) that it was not justified, thus imposing on the defendant the burden of persuasion that he was justified.

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[62]Strictly speaking, the defendant does not here meet a presumption. 22 C. J. S., CRIMINAL LAW, § 444. The issue is not guilt *vel non.* The plea may conceivably be that he had already been proven guilty. The presumption of innocence is not available. See 14 AM. JUR., CRIMINAL LAW, § 283.

[63]Huffstickler v. State, 129 Miss. 769, 93 So. 1 (1922); Garland v. State, 130 Miss. 310, 94 So. 210 (1922); Haley v. State, 106 Miss. 358, 63 So. 670 (1913); City of Collins v. Fife, 99 Miss. 648, 55 So. 484 (1911); Bishop v. State, 62 Miss. 289 (1884).

[64]The presumption of sanity being a mere assumption and spurious as a presumption, it casts no affirmative burden on the defendant. Ford v. State, 73 Miss. 734 (1896).

In the *Haley* case the Court held it error to instruct for the state that the burden was upon the defendant to show his justification, and further held that all he needs do is to raise a reasonable doubt.

Yet in the *Huffstickler* case the Court swung back to the holding in the *Fife* case. The *Garland* case reverted to the true rule as set out in the *Haley* case. In a later case[65] the correct rule was set out in a case involving the affirmative defense of immunity to prosecution for selling liquor. The Court said that the defendant complies with the burden of his affirmative defense "when he has introduced testimony to sustain this defense," and more to the point, stated "they [the jury] must be satisfied beyond reasonable doubt that the affirmative defense is not true." These cases seem to have been decided without reference to preceding inconsistencies. The diversity in views may have been due to an over-emphasis upon the statutory declaration that the burden of proving justification shall be upon the accused. In its last analysis this requirement was but declaratory of the rule that the state need not negative exceptions or acts of justification as an initial burden.

Always it has been the impropriety of importing presumptions into instructions which has confused the extent of the defendant's burden. Attempts to define such extent have included such tests as "a reasonable explanation,"[66] "must show,"[67] or to the satisfaction of the jury.[68]

In an early case, an instruction was held too broad which required the defendant "to prove the circumstances which excuse the act," but the defect was found in the omission to explain that the circumstances may arise out of the evidence produced against him. Thus the definition of "proof" was not given and the extent of the burden was not defined.[69]

In *Durr v. State*[70] the "presumption" of malice was held to "prevail . . . unless the facts in evidence change the character of the killing by showing either justification or necessity." It is deferentially submitted that this language creates too indefinite, if not indeed too heavy a burden, on the defendant. Justification in homicide is not an affirmative defense. A plea of not guilty puts in issue the necessary allegation of an absence of legal authority. The defendant need not "show" anything in the sense of proving it. His task rises no higher than to create a

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[65]Hosey v. State, 136 Miss. 5, 100 So. 577 (1924).
[66]Bills v. State, 105 Miss. 585, 62 So. 647 (1913).
[67]Ford v. State, 73 Miss. 734 (1896).
[68]Patterson v. State, 144 Miss. 410, 110 So. 208 (1926); Lamar v. State, 63 Miss. 265 (1885); Bishop v. State, 62 Miss. 289 (1884); Hawthorne v. State, 58 Miss. 778 (1880).
[69]McDaniel v. State, 8 S. & M. 401 (1847).
[70]175 Miss. 797, 168 So. 65 (1936).

reasonable doubt as to its unlawfulness.[71] So in the case of a defense predicated on an alibi. Here, after all, the defense is merely not guilty. The defendant seeks to show that he did not commit the crime because he could not. The alibi need not be "shown" to any particular degree except as sufficient to create the requisite doubt of guilt. It is therefore not an affirmative defense.[72]

In cases of bigamy where the defense is a divorce from a former spouse, an affirmative burden is assumed. Here, unlike the rule in civil cases, there is no presumption of divorce. To be exact, this does not involve the meeting of an adverse presumption since the so-called presumption of innocence is favorable to the defendant, and indeed is not strictly here available as the defense savors of a confession and avoidance.[73]

It is concluded, therefore, that in criminal cases the burden of persuasion remains throughout upon the state, and any presumptions invoked to aid it are met whenever reasonable doubt is engendered. The burden as to affirmative defenses is sustained, and must be sustained, by a preponderance of the evidence.

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[71]Reddix v. State, 134 Miss. 393, 98 So. 850 (1923). Burden of excuse is not on defendant. Herman v. State, 75 Miss. 340, 22 So. 873 (1897). Nor is self-defense an affirmative defense. Strother v. State, 74 Miss. 447, 21 So. 147 (1895). So also where bar of limitations is relied upon. Lowe v. State, 19 So. (2d) 106 (La. 1944); *cf.* Thompson v. State, 64 Miss. 740 (1877).

[72]9 WIGMORE, EVIDENCE (3d ed. 1940) § 2512 (c); THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898) 362 *et seq.*

[73]See Bennett v. State, 100 Miss. 684, 702, 56 So. 777, 781 (1911). Also *cf.* White v. State, 183 Miss. 351, 184 So. 303 (1938), where the presumption of innocence was retained so as to neutralize the presumption of continued life of the former spouse so that the state failed in its burden to show the former wife was living at the time of the second marriage. Had such fact been shown, the rule in the *Bennett* case would have applied.

Summary

1. In criminal cases the burden of proof of all ingredients of the offense remains immovably upon the state.
2. All presumptions available to supply evidence of elements of the offense must and do furnish evidence thereof beyond all reasonable doubt.
3. Proof of malice in murder is unnecessary and no presumption of malice need or ought to be invoked.
4. A presumption of intent is available to the state and arises from the fact of a deliberate killing, and if without authority of law, is presumed to be murder, however occasioned.
5. There should be retained no legal presumption of malice from the use of a deadly weapon.
6. There should be no legal presumption either of larceny nor of receiving stolen goods from a recent possession.
7. The so-called presumption of innocence is not a true presumption and should be weighed as a mere fiction.
8. Flight by the accused is merely relevant circumstantial evidence and creates no presumption.
9. All presumptions are solely for the judges and are never proper material for use in instructions. The only tenable exception is found in cases where defendant offers no evidence and the presumption imports into the case an element whose technicality is not a matter of ordinary reasoning.
10. The inferences implicit in the foregoing presumptions or circumstances remain as relevant data for appraisal by the jury and any comment thereon in instructions violates Section 1530 of the Code of 1942.
11. All presumptions of guilt, or of any element thereof, are met when the defendant creates by his evidence a reasonable doubt thereof.
12. Affirmative burdens assumed by the defendant involving factual issues other than that of guilt as charged (or of a constituent element) must be sustained by a preponderance of the evidence.
13. All affirmative burdens imposed upon the defendant by statute or by presumptions are burdens merely of adducing evidence and such burdens require only the creating of a reasonable doubt of guilt.

THE ASSESSMENT OF LIQUIDATED DAMAGES UNDER A CONSTRUCTION CONTRACT

*E. Kemp Cathcart**

The assessment of liquidated damages is, at this time, a problem of interest to all persons in the construction business, and to surety companies writing performance bonds on construction work, due to the fact that practically all contracts now contain provisions for such assessments under certain defined conditions.

In the past, and before the great increase in the construction and building trade, the general tendency of the courts seems to have been to look upon contract provisions for liquidated damages with a certain amount of disfavor[1] and, in many instances, to construe them as penalties not enforcible against the contractor or his surety.[2] It is not the purpose of this paper to discuss the cases which distinguish liquidated damages from a penalty. It may be said, however, that while certain states have statutes providing that liquidated damages may be assessed only where the loss would be impossible of ascertainment, or very difficult of ascertainment,[3] nevertheless, there has been a noticeable and gradual change in the decisions showing a tendency to uphold them rather than to construe them as being penal in nature. So long as the sum fixed as liquidated damages is not wholly disproportionate to the loss, the assessment is usually allowed,[4] unless there are other intervening causes which would prevent it; which causes, and their effect, will be hereinafter discussed.

Liquidated damages will not be allowed under the following circumstances, even though the amount thereof is not so disproportionate to the actual loss as to amount to a penalty:

1. Where the owner terminates the right of the contractor to proceed with the work.

2. Where there has been a total abandonment of the work by a contractor, thereby requiring completion by another.

3. Where the delay in completion is attributable not only to the contractor, but to the owner as well.

4. Where the evidence is clear and uncontradictable that in spite of the delay, there was no loss to the owner therefrom.

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[1]25 C. J. S., DAMAGES, § 102 (b); 15 AM. JUR., DAMAGES, § 245.

[2]Van Buren v. Digges, 11 How. 771 (U. S. 1850); 15 AM. JUR., DAMAGES, § 245; 25 C. J. S., DAMAGES, § 102 (b).

[3]25 C. J. S., DAMAGES, § 101.

[4]United States v. U. S. Engineering Company, 234 U. S. 236 (1914); 3 WILLISTON, CONTRACTS (rev. ed. 1938) § 2210; 15 AM. JUR., DAMAGES, §§ 240, 249.

I

A great many contracts, providing for construction work, contain a provision which allows an owner to terminate the right of a contractor to proceed under certain conditions, such as in case of default, and then collect his actual damages, or else permit the contractor to proceed and then collect a certain stipulated sum, as liquidated damages, for each day the work goes beyond the completion date. Such a provision does not do violence to the rights of either party, as if the owner terminates the right to proceed under the contract he is entitled to actual damages which would include any loss because of delay. The courts have consistently refused to allow any assessment of liquidated damages under such contracts where the owner adopts the termination method.[5] Such decisions are based on sound logic and on the intention of the parties as set forth in the contract.[6] It makes no difference whether the owner terminates the contractor's right to proceed prior to, simultaneously with, or subsequent to the stipulated completion date, since regardless of the time when the termination notice is served, the right of the owner to liquidated damages is thereby waived, and no assessment may be made.[7]

Some contracts allowing the owner to terminate the right of a contractor to proceed with the work do not contain the alternative provision that the owner might permit the contractor to proceed with the work, in spite of existing conditions which would justify termination, and in that event collect from the contractor, or his surety, the stipulated sum per day for each day of delay beyond the time set forth in the contract for the completion of the work. It would seem, however, that it makes little difference whether a contract does, or does not, contain this alternative provision. The assessment of liquidated damages, as stated previously and as will be more fully covered in succeeding paragraphs, depends upon the intention of the parties, as found in the contract;[8] and the intention as expressed in practically all contracts is to assess liquidated damages only in the event the original contractor proceeds with the completion of the work, and not where, through termination or abandonment, it is taken over by another.[9]

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[5]United States v. American Surety Company, 322 U. S. 96 (1944); United States v. Cunningham, 125 F. (2d) 28 (App. D. C. 1941); United States v. Maryland Casualty Co., 25 F. Supp. 778 (D. Me. 1938); Maryland Casualty Company v. United States, 93 Ct. Cl. 247; American Employers Insurance Company v. United States, 91 Ct. Cl. 231; Fidelity and Casualty Company v. United States, 81 Ct. Cl. 495; Commercial Casualty Company v. United States, 83 Ct. Cl. 367.

[6]United States v. American Surety Company, 322 U. S. 96 (1944); 15 Am. Jur., Damages, §§ 242-244.

[7]United States v. American Surety Company, 322 U. S. 96 (1944); Maryland Casualty Company v. United States, 93 Ct. Cl. 247.

[8]United States v. American Surety Company, 322 U. S. 96 (1944); 15 Am. Jur., Damages, §§ 243, 244.

[9]3 Williston, Contracts (rev. ed. 1938) § 2210; 9 C. J., Building and Construction Contracts, § 136.

II

The second circumstance eliminating the assessment of liquidated damages presents a more controversial subject. The contractor in many instances will abandon the work prior to the time the owner undertakes to terminate the right to proceed, realizing that he will be unable to complete the work and that to endeavor to do so would only increase the ultimate cost and loss to both himself and others. When he does this, the owner gets by the voluntary action of the contractor what he would otherwise have gotten only by his own affirmative action in terminating the right of the contractor to proceed. He gains control of the work, he is relieved of the contractor's inefficiency, and he may arrange for the completion of the work in a more satisfactory manner. Under such conditions, the owner not having taken the action which stopped the work, is he entitled to collect liquidated damages for delay up until completion of the work, as well as actual damages based on the final cost of completion to him? There is some conflict in the authorities in the answer to that question, but the conflict is slight and by far the majority of the decisions answer it in the negative.[10]

The courts always seem to base their decisions on the intentions of the parties as taken from the contracts; and in all except a few instances, it has been held that the clauses providing for liquidated damages were intended to apply only in the event of the completion of the work by the original contractor, and not in the cases where for some reason, such as abandonment, it has passed from his control.[11] It might be said that it appears that the courts have looked for and endeavored to find such an intention. It would be only natural to expect to find such an intention in the contract, as certainly no one would reasonably expect that a contractor, being a sound business man, would contract to have liquidated damages assessed against him after he no longer had control over the work. In such an instance, he would be entirely at the mercy of the owner, since the owner would be the sole one in a position to expedite the work, so as to get it completed at an early date, or else to allow it to drag on unreasonably at the cost and expense of the contractor. Accordingly, it is only sound logic that there must be, somewhere in the contract, the

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[10] *Ibid.*

[11] United States v. Maryland Casualty Company, 25 F. Supp. 778 (D. Me. 1938); Fidelity & Deposit Company v. Robertson, 136 Ala. 379, 34 So. 933 (1903); Sinnott v. Schumacher, 45 Cal. App. 46, 187 Pac. 108 (1920); Bacigalupi v. Phoenix Building Company, 14 Cal. App. 632, 112 Pac. 892 (1910); Gillette v. Young, 45 Colo. 562, 101 Pac. 766 (1909); Moore v. Board of Regents, 215 Mo. 705, 115 S. W. 6 (1908); Shields v. John Shields Construction Company, 81 N. J. Eq. 286, 86 Atl. 958 (1913); City of Ranier v. Masters, 79 Ore. 534, 154 Pac. 426 (1916); 3 WILLISTON, CONTRACTS (rev. ed. 1938) § 2210; 9 C. J., BUILDING AND CONSTRUCTION CONTRACTS, § 136.

expressed or implied intention that liquidated damages are to be assessed in the event of delayed, and not abandoned, performance.

There have been some ingenious arguments made to the effect that both liquidated and actual damages are recoverable in the event of abandonment by the contractor, but those arguments fail to take into consideration the practical side of the construction business. Perhaps the most frequent argument used is that the failure to allow the assessment of liquidated damages, upon abandonment of the work by a contractor, leaves it entirely to the contractor as to whether liquidated damages will ever be paid, since he may then relieve himself of such liability at any time short of completion, simply by abandoning the work or provoking the owner to terminate his right to proceed. As the Supreme Court has said, however, the contracting officers (owner) in turn would be induced to allow the contractor to proceed to completion, despite inexcusable delays, so as not to forfeit mounting liquidated damages, thus precluding prompt completion and occupancy of needed structures.[12]

Would it be more equitable to say that an owner shall be able to recover for liquidated damages, for delay, rather than to have to prove his actual damages because of the delay after the abandonment of the work by the contractor? Certainly, anyone familiar with the construction business would not say so, as the contractor has very much more at stake than mere liquidated damages. A default or abandonment very materially injures his reputation, and for that reason alone he will give the matter a great deal of thought and consideration before abandoning the project. Further, and probably more important, when an original contractor leaves a project, his organization disintegrates; and a new contractor taking over the work must bring in his own organization, or, if the owner should elect to complete the work himself, he must make up an organization. The expense of doing that is great, as every contractor realizes, and it would deter him from abandoning his contract merely for the purpose of avoiding what could be considered as only the relatively small liquidated damages. In addition to the reorganization expense, any contractor understands that a new contractor increases his price because of the necessity of taking up loose ends, and would want a substantial profit in order to assure himself against unforeseen contingencies about which the original contractor learned to his great misfortune.

It seems axiomatic that such existing conditions would in a very large percentage of the cases, greatly increase the excess cost to the owner over the original contract price, which excess cost would ultimately fall

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[12]United States v. American Surety Company, 322 U. S. 96 (1944).

as damages on the original contractor and his surety.[13] Under such circumstances the contractor would not merely abandon the project to avoid liquidated damages, when, as a matter of fact, such liquidated damages should be small in comparison with the excess cost of completion. There seem to be no comparative conditions which would exist and which would deter an architect, an engineer, or a contracting officer from allowing the contractor to proceed to complete despite inexcusable delays, if such representative of the owner knew that in spite of the delays the owner would be able to recover the liquidated damages. Therefore, from the practical and equitable side of the problem it is evident that an owner should be required to establish his damages for delay, where there is an abandonment, and should not be allowed to recover under the liquidated damages provision.

The rule, and the reasons for it, are best summed up in the case commonly referred to as the *Village of Canton* case,[14] where it is said:

> "The authorities quite uniformly hold, as far as I am advised, that a provision for liquidated damages in a building contract such as we are now considering should be construed as applying only to delayed and not to abandoned, performance. (Cases cited.)
>
> "The contract herein provides that on abandonment thereof by the contractor, the plaintiff may, itself, at its option, complete the work at the expense of the contractor. This provision, by the terms of the bond, is made subject to the prior right of the surety to do the same thing. It seems anomalous that an owner should be allowed liquidated damages for delays in the completion of the contract, which the owner, itself, completed, even though, as is probably true in this case, the plaintiff proceeded with due diligence. There are few cases indeed where it cannot be said that even more than due diligence might have been exercised. If the contractor had completed the contract, or had failed to do so within the required time, it would not be accepted as an excuse that reasonable diligence had been exercised. The contractor would have been bound by the terms of his contract, even in the face of an impossibility to complete within the required time. . . . In *Bradey vs. Mayor, etc., of New York,* it was said: 'Under the contract the defendant has a right to cancel it and to finish the work itself, charging Bradey with any

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[13] 9 Am. Jur., Building and Construction Contracts, § 68; 9 C. J., Building and Construction Contracts, § 151.

[14] Village of Canton v. Globe Indemnity Company, 201 App. Div. 820, 195 N. Y. S. 445 (1922).

excess in the expense of doing it. Could it also recover from Bradey $15.00 (per day) for its own delay in completing the work?'

"This significant question applicable to this case is not answered by the finding of the referee that the plaintiff and said Board without any unnecessary delay prosecuted such contract to completion. The provision for liquidated damages must be computed, not in the light of the fact, but in the light of possibilities permitted by such construction. There would be a constant temptation to an owner in such a case not to hasten the work to completion. The inference from this is that it was the intention of the parties that the liquidated damages should apply only to work performed by the contractor, and not by the plaintiff."

The majority rule based on the findings in the majority of the decisions is founded upon practical, sound and equitable principles; and the minority decisions[15] attempt to justify their departure from the precedent by professing to see a distinction, which in reality does not exist, or by the spectacle of conjuring up a contractor who purposely abandoned performance to escape the effect of liquidated damages when, as a matter of fact, such a spectacle, when considering the trade, could not be expected to exist. The majority rule is decidedly pronounced, and is supported by the text book writers,[16] and it is only in a few instances that the courts have misconstrued the intentions of the contracting parties, being apparently led to their conclusions by an unnecessary eagerness to facilitate the obligee's proof of damages at the cost of doing violence to the contractual intentions of the parties.[17] There is no need for doing such violence, as actual damages for delayed completion may always be incorporated into the verdict for the general damages arising from the breach; and this usually can be done without requiring from the obligee any more proof than is required to substantiate that the liquidated damages are not, in fact, a penalty.

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[15]Six Companies of Calif. v. Joint Highway District No. 13 of Calif., 110 F. (2d) 620 (C. C. A. 9th, 1940); (this case was overruled by the Supreme Court on another point, and without affirming in any particular, 311 U. S. 180); Southern Pacific Co. v. Globe Indemnity Co., 21 F. (2d) 288 (C. C. A. 2d, 1927); School District No. 3 v. United States Fidelity & Guaranty Company, 152 Pac. 668 (Kan. 1915); Clemente Construction Corp. v. Cox Contracting Co., 172 Misc. 904, 16 N. Y. S. (2d) 483 (1939); National Loan & Exchange Bank v. Gustafson, 154 S. E. 167 (S. C. 1930); Watson v. DeWitt County, 46 S. W. 1061 (Tex. 1898).

[16]3 WILLISTON, CONTRACTS (rev. ed. 1938) § 2210; 9 C. J., BUILDING AND CONSTRUCTION CONTRACTS, § 136.

[17](1940) 18 CHI-KENT. REV. 306.

A brief reference to the minority decisions will convince even the most doubtful that they do not express the fair and equitable answer to the problem, as do the majority decisions. It will be found that the minority decisions either are based on the false argument that if liquidated damages were not allowed under such conditions the contractor could avoid the effect thereof, any time short of completion, merely by abandoning the contract to the detriment of the owner, or by professing to see a distinction where the work passes from the control of the contractor by some action of his own, rather than by the affirmative action of the owner. As to the first reason advanced by the minority decisions for their conclusions, the fallacy of that has been covered in the preceding paragraphs. As to the second reason, there seems to be no basis, in fact, for it. If the majority rule is based upon the intentions of the parties, as it concededly is, then it would make no difference whether the work passed from the control of the contractor because of some action on his own part, or because of the action of the owner. The controlling fact is that the damages are to be assessed only where there is delayed completion, by the original contractor, and not where there is no completion at all by him. The owner loses nothing thereby because, it is again reiterated, he may recover any loss he suffered by the delay as actual damages.

In *United States v. Maryland Casualty Company,*[18] it is said:

> "It is manifest that this clause contemplated a completion of the contract, with damages for delay. There was no completion or attempt to complete, *but an utter abandonment,* and such clause was not intended to cover such a case, nor was provision made in the contract for such a contingency. Manifestly this clause has relation only to damages resulting from delay only and has no bearing upon the measure of damages for abandonment of the contract and failure to complete the work at all."

That statement seems to be clear beyond all doubt. In the case of *American Surety Company v. United States,*[19] the Supreme Court referred to the argument made to the effect that if liquidated damages were not allowed in the event of abandonment, the contractor would then be able to relieve himself of any liability at any time short of completion simply by abandoning the work, and then referred to the fact that the owner would in turn be induced to allow the contractor to proceed with the completion despite inexcusable delays, so as not to forfeit mounting liquidated damages, thus precluding prompt completion and

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[18]United States v. Maryland Casualty Co., 25 F. Supp. 778 (D. Me. 1938).
[19]United States v. American Surety Co., 322 U. S. 96 (1944).

occupancy of needed structures. It therefore had before it the question of abandonment, as well as termination, and proceeded to cite with approval the *Maryland Casualty Company* case just quoted above. Accordingly, even though not directly, at least indirectly the Supreme Court of the United States has supported the majority rule.

III

The purpose for inserting a liquidated damages clause in a contract is merely to allow the owner to recover for a delay by the contractor, when it would be impossible, or very difficult to prove actual damages in the event he were required to do so. However, it is not intended that such a provision should apply where the owner has failed strictly to perform his obligations under the contract.[20] If the contractor were to be assessed for liquidated damages where the owner failed strictly to perform his portion of the agreement, then the contractor would, in effect, be charged for delay which was caused not by himself, but by the owner. The Supreme Court of the United States very clearly enunciated the rule in such a situation,[21] when it stated that in order to enforce such payment (liquidated damages) the other party must not prevent completion of the work within the stipulated time.

It might be contended that where the owner delayed the work, but there was also some delay on the part of the contractor, there should then be an apportionment of the delay as between the parties, and the owner be allowed to recover liquidated damages for that portion properly chargeable to the contractor. However, no such formula, insofar as the writer is aware, has ever been set up in a contract. It seems that it would be practically impossible to set up, in advance of the accrual of the damages, a satisfactory formula for this purpose. In the absence thereof the Courts have consistently held that where there were delays on the part of both parties, no attempt at apportionment would be made; and the liquidated damages clause is, accordingly, considered as waived.[22]

IV

There is still another circumstance where liquidated damages sometimes are not assessed, even though there has been delay by the contractor and the contract contains a liquidated damages clause. This situation

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[20]District of Columbia v. Camden Iron Works, 181 U. S. 453 (1901); Ittner v. United States, 43 Ct. Cl. 336.

[21]United States v. United Engineering and Contracting Co., 234 U. S. 236 (1914).

[22]*Ibid.*; United States v. Kanter, 137 F. (2d) 828 (C. C. A. 8th, 1943); Sun Shipbuilding Co. v. United States, 76 Ct. Cl. 154; Bethlehem Steel Co. v. United States, 75 Ct. Cl. 845; Moore v. United States, 46 Ct. Cl. 139; 3 WILLISTON, CONTRACTS (rev. ed. 1938) § 2210; 25 C. J. S., DAMAGES, § 115 (c).

occurs when it is obvious, and uncontradictable, that in spite of the delay there could be no loss to the owner. For instance, the owner could have a contract for the construction of an apartment building, or for the construction of a building for some special type of business, but upon the completion of the building would be unable to use it because of some reason not attributable to the contractor. It may be that the contract did not call for the contractor to put in all of the facilities, and without those facilities the building would not be of any use. If the contractor was not in any way responsible in delaying the installation of the facilities, then obviously he would not be responsible in any way for any loss that the owner might suffer from delay; and any assessment of liquidated damages against him, under such circumstances, would amount to a penalty.[23]

There is a general rule regarding the assessment of liquidated damages; and it is that where the surrounding circumstances make it inequitable to do so, the other party may not insist upon the enforcement of the provision.[24] While it has been recognized in many jurisdictions that, in order to enforce a liquidated damages provision the owner does not have to prove any damages whatever,[25] still where it is clear from the facts and evidence that the owner could not have had any loss because of the delay of the contractor, it would certainly be inequitable to allow the assessment of damages under such circumstances. In such cases it is felt that if an attempt were to be made to assess the damages, they should be considered as a penalty, and therefore not recoverable.[26]

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[23]Northwest Fixture Co. v. Kilbourne, 128 Fed. 256 (C. C. A. 9th, 1904).

[24]United States v. California Bridge & Construction Co., 245 U. S. 337 (1917).

[25]Rispin v. Midnight Oil Co., 291 Fed. 481 (C. C. A. 9th, 1923); Northwest Fixture Co. v. Kilbourne, 128 Fed. 256 (C. C. A. 9th, 1904); 15 AM. JUR., DAMAGES, § 263.

[26]*Ibid.*; Calabro Construction Co. v. Township of Hamilton, 131 N. J. Eq. 1, 25 A. (2d) 515 (1941); Britton v. Cotton States Petroleum Co., 283 S. W. 887 (Tex. 1926).

ADMINISTRATIVE ACTIVITIES OF THE UNION ARMY DURING AND AFTER THE CIVIL WAR

*William A. Russ, Jr.**

During peace times the army has always been a kind of handy-man-about-the-house, or, to change the figure of speech, a sort of utility fielder, who is called upon to function anywhere at any time. The peace-time duties, some of them of a non-military character, are varied. The army has governed some of our colonies and islands.[1] It sometimes patrols in areas where strikes, earthquakes, or floods require its presence. The Panama Canal was built under the direction of the War Department, even though the canal itself carries ships. Some years ago the President transferred the transportation of the air mail to army fliers; and in the beginning military men took charge of the C.C.C. camps because no other agency of the Government had the experience or equipment for that kind of work.

War, however, offers a different kind of problem. Recently-conquered territory cannot be permitted to fend for itself. Conquest brings the obligation to govern, at least temporarily. Law and order are necessary for the welfare of the civilian population; utilities must be operated; disease must be controlled. Until civilian authority can be established, the victor is bound to undertake the routine business of administration. Moreover, such areas may have large numbers of disloyal persons, spies, and enemy agents. To permit these to act behind the victorious armies would be ridiculous.

In training men at Charlottesville, Virginia, for governmental and administrative activities in occupied territories, the United States has taken an important new departure. During previous wars no provision was made for the training of personnel to rule occupied or disloyal areas. For instance, in the Civil War, the army performed much administrative work, both in seceded and in Union territory, but made no effort to train men for that service. In the present conflict, however, it is confronted with a tremendous problem of governing liberated countries in which the languages are unfamiliar, in which governmental machinery has broken down, and in which relief and rehabilitation are prime necessities. Obviously those men who have been trained as paratroopers, or infantrymen, or tank operators, could hardly be expected suddenly to turn into efficient administrators of conquered areas. During the Civil War and

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[1]See D. Y. Thomas, A History of Military Government in Newly Acquired Territories of the United States (1904).

reconstruction this lesson had not been learned. Modern war is specialized war, and it is as necessary to train specialists in governing as it is to train specialists in fighting. Hence the Allied Military Government.

The work of the A.M.G. is receiving considerable attention in both the scholarly and more popular publications. For instance, Colonel Charles Poletti described its duties in Italy to readers of *The New York Times Magazine* for July 16, 1944; and Max Ascoli wrote on "Italy, an Experiment in Reconstruction," in *The Annals of the American Academy of Political and Social Science* for July, 1944. Historians are showing interest in the development of military government. Thus Ralph H. Gabriel has discussed "American Experience with Military Government" in *The American Historical Review* for July, 1944. He finds that the rules and regulations as now used by the American army were for the most part originally established by General Scott during the Mexican War.

In view of this awakened interest in the problem of governing conquered territories, it is worth recalling something about the administrative activity of the Union army during and after the Civil War. The situations differ in many respects, but the fundamental jobs are the same: salvaging areas of divided sentiment; governing conquered territories, reviving civil authority, dealing with prisoners, and handling disaffected persons. Some of these tasks of the Union army will now be discussed.

I. Maintaining the Border States

As soon as hostilities began in 1861 the Federal Government found it necessary to save Missouri, Kentucky, and Maryland for the Union cause. The instrument that was nearest at hand to accomplish this purpose, particularly in Maryland and in Missouri, was the military. Maryland was Secessionist to a startling degree; if it seceded, the Government would be entirely surrounded and isolated from the loyal North. Lincoln ordered the army to arrest the mayor of Baltimore and the leading Secessionists in the Maryland legislature[2] and thereby saved the state—perhaps even the Union cause. Missouri, also, was divided in sentiment, and its governor was rebel. The loyal work of General Nathaniel Lyon and Frank P. Blair kept the state in the Union, although its government had to be reorganized. The Union army faced an enormous task in rooting out disloyalty during the rest of the war.

Indeed the army became the mainstay of the Provisional Government of Missouri. For instance, General A. B. Brown issued a general

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[2]For the full story, see Russ, *Disfranchisement in Maryland (1861-67)* (1933) 28 Md. Hist. Mag. 309.

order, covering the military district of southwest Missouri, in which every loyal citizen was required to appear before the proper authority and get a certificate showing he had taken the oath of allegiance. The following part of the order shows that in Missouri, the army was in actuality the government:

> Every citizen who fails to obey the above order will be deprived of the ordinary privileges of loyal citizenship. He shall neither hold any office nor be permitted to vote; he shall not be allowed to serve as a juror or appear as a witness; he shall not transact any business, either agricultural, mechanical or professional; he shall not be permitted to pass at will upon the public highway, but as a punishment for the apparent aid and countenance which he extends to the marauders who are preying upon the country he is declared to be a prisoner within the limits of his own premises.

All officers were to watch for such persons and bring them to the nearest military post.[3]

II. Dealing with Disloyal Persons

Disloyalty vegetated in areas other than in the border states, but it was in the latter that the army became the chief weapon in neutralizing the efforts of Disunionists. In a state like Maryland, where there were many Secessionists, the handling of the problem was one of the main duties of army officials. Legally or illegally, disloyal persons must be arrested or in other ways made innocuous. Sometimes superseding the civil officials, sometimes supporting them, and often conflicting with them,[4] the army imprisoned hundreds, prevented others from exercising the franchise, and kept still others under close surveillance. Those imprisoned were, after a time, usually permitted to go home if they took the oath of allegiance.[5]

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[3]THE WAR OF THE REBELLION: A COMPILATION OF THE RECORDS OF THE UNION AND CONFEDERATE ARMIES (1880-1901) Series II, Vol. 4, pp. 28-29. Hereafter called WAR OF THE REBELLION.

[4]A celebrated example of conflict between military and civil officials was the Merryman affair early in the war. Merryman was a Southern agitator in Maryland who was placed in Fort McHenry by the military authorities. He petitioned Chief Justice Taney, who was sitting as circuit judge, for a writ of *habeas corpus*. Taney issued the writ and ordered the commander of the fort to honor it. The commander refused and Taney directed a writ of contempt against him. Taney said the marshal had the power to summon a *posse comitatus* and storm the fort. The Chief Justice then called upon Lincoln to abide by the law. The President refused to answer, although later Merryman was turned over to the civil officials. See *Ex Parte* Merryman, 17 Fed. Cas. 144, No. 9,487 (D. Md. 1861). It is discussed in CUSHMAN, LEADING CONSTITUTIONAL DECISIONS (6th ed. 1937) 114.

[5]For examples, see WAR OF THE REBELLION, Series II, Vol. 2, pp. 349-58, 456-63, 480-85.

At times the military carried its activities even further than civil officials at Washington dared to countenance. For example, H. H. Wells, Provost Marshal General of the Defenses south of the Potomac, sent a circular dated June 23, 1863, to all suspected persons in Alexandria, Virginia, ordering them to give proof of loyalty to the United States within forty-eight hours, or be removed with their families to City Point. This order undoubtedly grew out of the preparations to meet Lee's invasion. After Gettysburg, Stanton decided it should be suspended, and Wells was so ordered.[6]

In general, however, the military men were permitted to carry out their police work unhindered. Thus it fell to the army to do most of the arresting of disloyal persons. Sometimes this was done with characteristic military efficiency, that is to say, with little concern for personal rights and freedom of speech. There were reasons why this unpleasant work had to be performed by the military. In many sections of the border states, rebel sympathizers were so numerous that the regular civil officials could not handle them. Sometimes the civil authorities were inefficient or lukewarm in their loyalty. Often the areas concerned were in danger of invasion or were near military operations, and so it was an absolute necessity for the army to take over the duty.

In the military records formerly at the Munitions Building in Washington, and very likely by now in the National Archives, is a book which shows clearly the sort of police work which the army performed around the capital. It is Volume 369 of the Department of Washington series, and is entitled, "Register of Disloyal Persons. P. M. G. [Provost Marshal General] Defenses South of [the] Potomac." Included are the name, residence, and remarks about all persons who were disloyal or suspected of being so. Typical comments to be found are: "A treacherous rebel, an unprincipled hypocrite; will do anything for money"; "Is a moderate Secessionist"; "Been in the Rebel Army"; "Wife a strong secessionist"; "Has been South during the war"; "Very violent; has refused to take the oath"; and "Been arrested for assisting deserters." In another section of this volume there is a "Record of Houses in Alexandria Va seized by Prov Marshal Genl. Defenses South of Potomac."

The volumes of the *War of the Rebellion* contain many reports regarding suspected rebels. One such report which was made to General Porter, the Provost Marshal at Washington, read in part: "Of course it is unnecessary for me to suggest that the safety of the country demands as a military necessity that this pert sprig of aristocracy—is full of secession venom that he would gladly forswear his foster Government, swear

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[6] *Id.*, Vol. 6, pp. 60-1, 76.

allegiance to the Confederate States and glory in being called a rebel—should be kept in close confinement until the end of the war for the Union."[7]

Strangely enough, the control of political prisoners—after the army arrested them—was in the hands of Seward and the State Department until February 14, 1862, when it was turned over to the War Department where it belonged. Seward was not at all sorry to get rid of this unpleasant work which incurred the enmity of lovers of liberty. He followed the policy, without too much success, of endeavoring to persuade incarcerated individuals to take the oath and secure release from confinement.[8]

Upon taking over from Seward, Secretary of War E. M. Stanton found the prisons so full that he ordered the freeing of all those inmates who would take the oath or accept parole. For that purpose he appointed two commissioners to examine all cases that were eligible for release. By March 28, 1862, eighty-seven were liberated, seventeen of whom took the oath of allegiance.[9]

Relieving the crowded conditions in the prisons did not decrease to any great degree the burden which rested upon the army in dealing with disloyal persons. It was an ever-present problem, particularly in the border states. At times the headache continued even after prisoners were released and became good citizens, for sometimes the Unionists back home objected when the liberated persons returned. General John C. Frémont of the Mountain Department wrote to L. Thomas, the Adjutant General, on April 13, 1862, to ask what he should do in regard to former citizens of Virginia, who, having gone into the Confederacy, took the oath and came home to claim their property. Said Frémont: "The people of the Wheeling government are strongly opposed to the return of these persons among them, and in the opinion of Governor Pierpoint their presence here would involve the most serious difficulties."[10] Undoubtedly many of those who wished to return to their allegiance, after the Union army spread southward and offered them protection, had entered the rebellion because they had no other recourse; and yet they were looked upon with disdain and suspicion by those who had stayed at home, and, mayhap, profited by their departure. Nevertheless, in spite of the trying problems involved in such work,

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[7] *Id.*, Vol. 2, pp. 208-10.

[8] 2 BANCROFT, LIFE OF WILLIAM H. SEWARD (1900) 254-81. This chapter deals with many noted cases of imprisonment for disloyalty. See also Stanton's Order No. 1, Feb. 14, 1862, relating to political prisoners, in WAR OF THE REBELLION, Series II, Vol 2, pp. 221-23.

[9] WAR OF THE REBELLION, Series II, Vol. 2, pp. 249, 264-66, 274-75, 276-79.

[10] *Id.* at 284.

there often was satisfaction, as General George W. Morgan who was stationed at Cumberland Gap, told Stanton: "Citizens of Virginia, Kentucky and Tennessee come in by the dozen to take the oath of allegiance to the United States. A moment ago thirteen Virginians came in, and when I welcomed them back to the old flag every eye was dimmed with tears."[11]

Peculiar situations that would have taxed the ingenuity of a Philadelphia lawyer now and then puzzled even the legal officers of the army. For instance, Judge Advocate L. C. Turner asked Stanton what should be done about a batch of disloyal persons from Virginia. He described them as follows:

> They severally swear that they had never given any aid or information to the rebels, but had fed them just as they had fed the Union soldiers. They also swore emphatically that they would not take the oath of allegiance to the United States because they were citizens of Virginia and owed their allegiance to that State, and that they sympathized with the South, but if Virginia went back into the Union then they would willingly take the oath of allegiance to the United States. They all swore that they would willingly give their parole under oath not to aid, comfort, or give information to the rebels.[12]

The attitude to be taken towards disloyal persons of course depended upon the zeal of the individual commander in each district and upon the circumstances he found there. In general, however, the rule of the army was rigid and strict in its attempt to encourage loyalty and discourage disloyalty.

As already indicated, Missouri was a hotbed of disunionism, and military men were forced to spend much of their time combating it. General S. R. Curtis at St. Louis told General T. H. Holmes of the Confederate army: "There is but one class of 'citizens of Missouri'; they are Federal citizens, not Confederate. They universally acknowledge allegiance to Federal and State authority."[13] In February, 1862, General H. W. Halleck ordered all officials of the University of Missouri to take the oath of allegiance, or to vacate their posts.[14] At St. Louis he imposed a levy upon all rebels, the amount to be determined in accordance with their guilt, for the purpose of raising money to feed the suffering poor. Later he announced that no further assessments would

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[11] *Id.*, Vol. 4, p. 60.
[12] *Id.*, Vol. 6, pp. 126-27.
[13] *Id.*, Vol. 5, pp. 146-47.
[14] 33 JOSEPH HOLT MSS. (Library of Congress) 4356.

be made upon those who took the oath.[15] At Warrenton, Missouri, General John M. Schofield instructed his troops to restore property only to those persons in Lincoln County who took the oath.[16] Schofield followed the policy of releasing those who took the oath and who gave bond for future loyalty, but he warned his subordinates that "much caution is required to prevent the escape of bad men in this manner."[17]

Tennessee presented problems that were even worse, if that were possible, than did Missouri. General G. M. Dodge at Trenton, Tennessee, ordered the Provost Marshal to arrest all who refused to take the oath; anyone who persuaded another not to subscribe was to be punished. Certain rebels who had burned a bridge were required to rebuild it and take the oath, or be arrested.[18] At Jackson, Tennessee, General John A. Logan arbitrarily demanded that all citizens over eighteen take the oath "by Saturday, 12th instant, 12 o'clock m.," or be arrested as prisoners of war.[19] At Nashville General W. S. Rosecrans proclaimed: "Persons denying that they are citizens of the United States, repudiating the duties of citizens by word or actions, are entitled to no rights save those which the laws of war and humanity accord to their characters."[20] Trial by military commission of civilians who had broken their oaths and/or aided the Confederacy was common.[21]

Military officials raised up for themselves a great deal of criticism for such acts. The constitutional rights of free speech and trial by jury were invoked repeatedly both by those who were innocent and therefore unjustly arrested and by those who attempted to hide their crimes through an appeal to their inherent rights. Protests against arbitrary arrest were legion, particularly in Kentucky.[22] The most famous instance of a protest against trial of civilians by military commission was the *Milligan* case.[23] Arrested by the commander of the military district of Indiana, and convicted by military commission for disloyalty and

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[15] WAR OF THE REBELLION, Series I, Vol. 8, pp. 431, 561.

[16] *Id.* at 607.

[17] *Id.*, Series II, Vol. 4, pp. 59-60. Other commanders elsewhere followed similar policy. For instance, see Burnside's Field Order No. 13 of April 17, 1863, covering East Tennessee, in Series I, Vol. 30, Part 3, pp. 718-19.

[18] WAR OF THE REBELLION, Series II, Vol. 4, pp. 146, 150, 151.

[19] *Id.* at 162.

[20] *Id.* at 737, 211. A similar announcement was made by General Pope of the Army of Virginia. *Id.* at 271.

[21] See, for example, the Nashville Despatch, Sept. 2, 1864, for the trial of Mrs. Mary Rowland who had broken her oath.

[22] See, as a typical example, the appeal to Judge Advocate General Joseph Holt by a resident of Frankfort, Ky., in 34 HOLT MSS. 4478.

[23] *Ex Parte* Milligan, 4 Wall. 2 (U. S. 1866). Some new facts on the *Milligan* case have been dug up by Kenneth M. Stampp, who has written *The Milligan Case and the Election of 1864 in Indiana* (1944) 30 MISS. VAL. HIST. REV. 41. In February, 1864, the Court refused to review the Vallandigham case because a military commission was not a court within the meaning of the Judiciary Act of 1789.

insurrectionary acts, Milligan appealed. His case reached the Supreme Court after the war ended. The Court decided that neither Congress nor the President had the power to set up military tribunals save in actual theaters of war where no civil courts were functioning.

Another practice of the army which received endless denunciation from many civilians was its policing of the polls at elections to prevent disloyal persons from voting. This activity sometimes led to impasses between the military and state officials. At one election the Governor of Maryland countermanded an order by the military men who wanted to supervise the polls; and Lincoln had to intervene to settle the controversy.[24] In Kentucky Governor Bramlette ordered civil officers at the polls to pay no attention to military interference in the coming (1864) elections; but General Burbridge replied that rebels were not going to vote if the military had anything to do with the matter.[25]

Senators Lazarus Powell and Garrett Davis of Kentucky became the most articulate opponents of military supervision of elections and tried repeatedly to secure enactment of laws to prevent it. A weak measure was finally passed, February 25, 1865, just as the war was about to end.[26]

III. Repatriating Deserters and Rebel Prisoners

In war the army is expected to have charge of prison camps, a task which, under ordinary circumstances, should place no new burdens or obligations upon military officials. But the Civil War differed from an international war. Large numbers of persons were forced against their will into the Confederate service; furthermore, it was the policy of the Federal Government to persuade all rebels to return to their allegiance. In fact, if all did so, the war would end. Thus Northern armies were supposed to do more than kill and capture rebels. In order to weaken the enemy, efforts were made to cause desertion from the Confederate ranks; and if prisoners were taken, army officers were permitted to persuade them to take the oath, and even to enter the Union service. Hence the character of the war placed upon the army a heavy burden of clerical and administrative work in handling the problem connected with repatriating deserters and prisoners. The incidence of the task is clear to anyone who opens up almost any volume of the *War of the Rebellion.* Much of the time and energy of the army was devoted to this job, and if one reads between the lines he secures the impression that many generals were not too eager to waste their

[24]See Russ, *Disfranchisement in Maryland (1861-67)* (1933) 28 Md. Hist. Mag. 309, 314 *et seq.*

[25]Nashville Despatch, Oct. 27 and Nov. 1, 1864.

[26]Cong. Globe, 28th Cong., 2d Sess. (1865) 118-19.

efforts in such administrative detail. Other military men undoubtedly did not object to the work because at least it was safer than fighting on the front lines.

One also gains the impression from a study of this phase of military administration that the personnel lacked any training in handling the job; it was a kind of work which needed an A.M.G. Of course after a time the men detailed for such activity learned from experience. Nevertheless, throughout the war, military men wrestled with problems of law and psychology that were too much for them.

Granted that, from a political point of view, it was wise to release all deserters and prisoners who swore they were loyal or who swore they had had a change of heart; military men, however, saw the danger of following such a policy because spies and Secessionists might easily worm their way out of prison and even into the Union army.[27] General after general asked whether such persons could be trusted.

Nevertheless it was expected from the very beginning of the war that military men should take upon themselves the duty of offering release to prisoners who were willing to accept the oath of allegiance. Congress recognized that this was a military function when it ordered, on July 8, 1861, that army officers send the names of all released prisoners to the War Department.[28] Thus the army officers were taking on a hard task that was over and beyond their primary duty, which was fighting.

One of the earliest examples of this activity was on July 15, 1861, when General N. P. Banks at Annapolis released some privates who had recently been captured by McClellan and who were willing to take the oath of allegiance. But officers who had resigned from the Union army were retained in custody.[29] On December 7, 1861, General John Pope reported from Syracuse, Missouri, that many of General Price's men wished to take the oath and return to civil life. But Pope was not too confident of their trustworthiness. He continued: "One-half the men in this section of country have been thus sworn in by one side or the other but there are few of them who observe such oaths."[30] Missouri presented, as did the other border states, nice problems in this respect.

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[27]See, as only one instance out of myriads, the charge that returning Confederate soldiers took the oath in order to be free to recruit for the rebel army around Cythiana, Ky. WAR OF THE REBELLION, Series II, Vol. 2, p. 273. The authority on the subject of desertion is Ella Lonn in her DESERTION DURING THE CIVIL WAR (1928).

[28]WAR OF THE REBELLION, Series II, Vol. 2, p. 17.

[29]*Id.* at 30-31, 34.

[30]*Id.*, Vol. 1, p. 147.

At first military officials permitted exchanges and paroles, but later it was felt that the oath of allegiance must be required of all who wished to desert the Confederate cause. The oath of allegiance was also broken, because many secured their freedom only to work for the Confederacy. General Halleck warned General Steele that more caution must be exercised and that if oath and/or parole were violated, death was to be the punishment. Records were to be kept of all oath-takers, and Halleck promised to send blanks for that purpose.[31] Needless to say this requirement meant that much more paper work for the military officials. By January 11, 1862, Halleck was disgusted at the way in which prisoners and deserters took the oath and then broke it. "This taking of prisoners [he said] and releasing them over and over again is all wrong; it is time to end it."[32] Soon he ordered the establishment of boards of officers to examine all prisoners of war who wished to take the oath. If they were found to be sincere, they were to be liberated.[33] Still there were violations, and again Halleck warned that those who broke their oaths "will most certainly be executed."[34]

Army officers were of course plagued by orders and requests from high officials at Washington to show clemency. Relatives of prisoners appealed to Lincoln, or to their Congressmen, or to the Judge Advocate General, and often the military men had to make exceptions because of pressure placed upon the political leaders.[35]

What to do with prisoners who had subscribed to the oath was often a hard question to answer. It was feared that if they were sent South under parole they would either be punished or impressed into the Confederate service. Finally it was decided that those who so wished might live in the North, but were expected to work for their own livelihood and pay for their own transportation.[36]

Others wanted to join the Union army. At this point military considerations entered the picture. It was one thing to allow deserters and prisoners to return to civil life provided they took the oath of allegiance. It was still another matter if they desired to enlist in the Union service. Military officials were likely to question the reliability and loyalty of troops who had once fought for the South. It was a

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[31] *Id.* at 151, 157.
[32] *Id.* at 158, 163.
[33] *Id.*, Series I, Vol. 8, p. 561.
[34] *Id.* at 177.
[35] As one example of many, see a letter dated April 26, 1862, in 33 JOSEPH HOLT MSS. 4356. A father residing in Louisiana, Missouri, pleaded for his son's release; the son had gone South, was captured and was rotting in prison. See also 33 *id.* at 4805 for a similar instance.
[36] WAR OF THE REBELLION, Series II, Vol. 5, pp. 127, 176.

hard choice, especially when attempts were being made in Tennessee and Arkansas to encourage the formation of loyal governments. Furthermore, men were needed badly because of opposition to conscription in certain areas of the North. If Union ranks could be filled by such means, why not do it? General Halleck seems to have had no objection to the enlistment of prisoners and deserters for he ordered the recruiting officer at Chicago to fill up Union regiments in that manner; hence when, on March 4, 1862, Governor O. P. Morton asked whether certain prisoners, mostly from Tennessee who were at that time in prison camps in Indiana, might be given the oath and permitted to enlist, Halleck gave his permission. But he warned that the men must be sincerely Unionist. The War Department disavowed Halleck's permission.[37]

As usual, however, political considerations soon entered the scene. The appointment of Andrew Johnson as military governor of Tennessee reopened the question. He informed the War Department that, if Tennessee prisoners of war who would take the oath were released, the efforts to construct a loyal government in that state would be materially aided. The Department relented on August 4, 1862, and soon Tennessee prisoners were being released to return to civil life or to enter the army.[38]

This decision opened the way for prisoners from other border states to do the same.[39] Kentuckians who said they had been railroaded into the rebel service began to desert and take the oath.[40] Likewise, some Poles and Germans who had been impressed into the Confederate army secured their release.[41]

The policy of liberating deserters and prisoners of war to enter civil life or the army alternated in generosity and severity until Lincoln issued his amnesty proclamation and his one-tenth plan of reconstruction on December 8, 1863. At this point the problem entered a new phase. The political aim of reconstructing loyal Southern state governments became as important as the military one of filling Union regiments. Under the amnesty terms, those who voluntarily deserted the rebel cause and took the oath included in the proclamation were welcomed and permitted to vote and hold office under the restored state governments. While few deserted the rebel army in order to accept the amnesty, the proclamation immediately produced trying problems for

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[37] *Id.*, Vol. 1, pp. 172, 174.
[38] *Id.*, Vol. 4, at 328 and *passim;* New Orleans Delta, Aug. 26, 1862.
[39] *Id.* at 359, 370, 392 and *passim*; *id.*, Series I, Vol. 20, at 82, 83.
[40] *Id.*, Series II, Vol. 4, at 756; *id.*, Vol. 5, at 51-52.
[41] *Id.*, Series II, Vol. 4, at 240-41.

the army. At once many in prison camps desired to accept the offer, especially conscripts and young boys.[42] Lincoln soon learned that his offer had been misinterpreted, and he was forced to issue a supplementary proclamation explaining that amnesty was not applicable to prisoners of war already in Union hands, but rather to those who voluntarily deserted the Confederacy.[43] Later, however, Lincoln did not adhere to his own warnings because he sent military officials around to the prison camps offering amnesty to those who would accept it. Upon subscribing, they might go home and vote or enter the Union army.[44] General Grant did not like the policy, but Lincoln said it was accomplishing a good purpose. The President admitted that Congressman brought lists of prisoners they wished to have released, and that for political reasons he was often forced to acquiesce.[45]

IV. Reconstructing Loyal Governments in Seceded Areas

In accordance with the political program of the Federal Government to get the seceded areas back into the Union as soon as possible, the army did much work in attempting to create loyal regimes in areas that had seceded. This activity differed from that which the army carried on in the border states. In Maryland, Kentucky, and Missouri the task was to put down disloyalty and to back up the governments that already existed. In the seceded sections the job was that of creating new governments. Thus when the army moved into rebel territory, its job became political as well as military. Until Lincoln proclaimed his amnesty oath of December 8, 1863, army officers used the oath of allegiance as the means of separating the sheep from the goats.

In what was perhaps the first reconstruction scheme of the war, General John A. Dix on November 13, 1861 sent a proclamation to the people of Northampton and Accomac Counties, Virginia, which were about to be occupied by Union soldiers. Dix announced that the inhabitants might take the oath of allegiance and that civil officers were to continue to function if they subscribed; the people were then to try to elect Congressmen, and in general act with western Virginia and accept its Governor. The way in which the army enfranchised and disfranchised is clear from Dix's instructions of November 28, 1861, to his subordinate, General Lockwood: ". . . we have a right to require as you have done that those who are in the execution of public trusts should

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[42] *Id.* at 820; New Orleans Delta, March 20, 1864.

[43] 10 NICOLAY AND HAY, COMPLETE WORKS OF ABRAHAM LINCOLN (enlarged ed. 1905) 58-60. The proclamation of Dec. 8, 1863, appears in 9 *id.* at 218-23. A spy who had been convicted and condemned to hang proposed to save himself by taking the amnesty oath. WAR OF THE REBELLION, Series II, Vol. 6, pp. 752-53.

[44] 10 NICOLAY AND HAY, *op. cit. supra* note 43 at 210.

[45] 10 *id.* at 228.

take the oath of allegiance. If they refuse they decline to recognize the authority of the Government, and can claim none of the benefits or immunities promised by the proclamation." By December 12 Dix was able to say that all magistrates of Accomac had taken the oath and that the county was restored; he was even thinking of reinstating a United States surveyor and collector in the area. The scheme did not work, however, and in April of 1862 Dix admitted that his reconstruction efforts had failed.[46]

Another interesting attempt by an army officer to get local government going took place at Key West, Florida, although conditions were somewhat different from those in Accomac and Northampton. Key West never fell to the Confederacy because Major French with a Federal regiment occupied it in the spring of 1861. Throughout the war, Judge William Marvin presided at that place over the only federal court which remained in Florida. On September 6, 1861, French ordered all males who had taken the oath of allegiance to send their names to him; moreover, all citizens were told to take the oath within sixty days or they would be sent into the Confederate lines. Later he issued a military order restoring civil rule under legally elected officials provided they had subscribed to the oath.

When Sherman took Jacksonville in 1862, he gathered about one hundred Unionists into a convention which declared secession null and void; but when he left, most of the Unionists also had to go because they feared for their lives. They were taken to New York and fed at public expense.[47]

A fourth instance of endeavors to form nuclei in rebel areas had to do with the Hatteras Inlet section of North Carolina. After it had been captured by General Benjamin Butler, Colonel Rush C. Hawkins of the Ninth New York Volunteers registered 250 Unionists who took the oath and offered to help in putting down the rebellion. When they promised to raise a Union regiment, Lincoln told Hawkins to enlist one among them. Soon a new State Constitution was written by a tiny convention of loyalists who then named a certain Marble Nash Taylor as Provisional Governor. On November 28, 1861, elections were held for a Congressman and Charles Henry Foster was selected. When Foster came to Washington the House refused to admit him because of

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[46]War of the Rebellion, Series II, Vol. 2, pp. 139-40; 149-50; 157-58; 176-77; 281-82.

[47]The efforts at reconstruction in Key West and in Jacksonville are discussed by William Watson Davis in The Civil War and Reconstruction in Florida (1913) 248-49; see also War of the Rebellion, Series II, Vol. 2, p. 56.

the minuteness of his constituency. At one election he received eighty-one votes, all of them cast in one precinct.[48]

Lincoln, believing there was much Union sentiment in the section, appointed Edward Stanley as military governor on May 19, 1862. Stanley arrived at New Bern, backed by Burnside's army. Attempts to revive a loyal government continued; and in January, 1863, another claimant, named Jennings Pigott, appeared at Washington seeking admission to Congress. Foster contested his seat. Only 864 votes had been cast, of which 595 went to Pigott. Military Governor Stanley had signed his credentials, but a mass meeting of loyalists at Beaufort protested against his admission because Stanley had permitted traitors to vote. Pigott was also objected to because he was secretary to the military governor. The House refused him. Stanley, seeing the hopelessness of the situation, resigned in March, 1863.[49]

Not all military officials wished to bother about political problems. One of these was W. T. Sherman. In Warren County, Mississippi, H. W. Hill, chairman of a meeting of citizens, wrote Sherman regarding the reconstruction of local government in that county. In his answer of September 7, 1863, the General frowned upon the idea, but did admit that if reconstruction were to take place, it should begin at the bottom; loyal precincts should first be built up and then counties. In a tone characteristic of the military method, and even more characteristic of Sherman's forthrightness, he continued:

> . . . we are justified in treating all the inhabitants as combatants and would be perfectly justifiable in transporting you all beyond the seas if the United States deemed it to her interests; but our purpose is not to change the population of this country, but to compel all the inhabitants to acknowledge and submit to the common laws of the land.[50]

A few days later Sherman wrote to Halleck on things in general and included his ideas about reconstruction in particular. His opinions represented the military man's practical way of looking at the situation:

> A civil government for any part of it [the South] would be simply ridiculous . . . I would deem it very unwise at this time, or for years to come, to revive the State Governments

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[48]For this strange case, see CONG. GLOBE, 37th Cong., 2d Sess. (1862) 3, 132, 1103, 2846-47, 2879-80, 2190, 3102; HOUSE DOC. 53; HOUSE REP. 118; and J. G. DE R. HAMILTON, RECONSTRUCTION IN NORTH CAROLINA (1914) 81-95.

[49]CONG. GLOBE, 37th Cong., 3d Sess. (1863) 334, 962, 1208-12; and HOUSE DOC. 13.

[50]WAR OF THE REBELLION, Series I, Vol. 30, pt. 3, pp. 401-4.

> of Louisiana, &c., or to institute in this quarter any civil government in which the local people have much to say . . . The only government now needed or deserved by the States of Louisiana, Arkansas, and Mississippi now exists in Grant's army . . . The people of this country have forfeited all right to a voice in the councils of the nation. They know it and feel it, and in after years they will be the better citizens from the dear-bought experiences of the present crisis.[51]

Sherman's views are interesting in that several months later Lincoln issued his proclamation encouraging loyal governments in these very areas, and that already small beginnings had been made in Louisiana, Tennessee, and Arkansas. It is also evident that Sherman changed his ideas between then and the end of the war when he signed the Johnston-Sherman capitulations. But his belief that rebels had no rights whatever continued through his March to the Sea; at Savannah, one Solomon Cohen asked General Frank P. Blair whether he could practice law. Sherman answered on January 31, 1864, that "No one can practice law as an attorney in the United States without acknowledging the supremacy of our Government." Furthermore, Cohen was advised that if he remained in Savannah his property would not be disturbed unless needed for military purposes; on the other hand, if he left, he would be considered an enemy and his property would forfeit to the United States. Sherman added that not even a merchant might carry on his trade unless he acknowledged the Federal Government.[52]

Whether Sherman's opinions were right or wrong, it was all too clear that the measures by the army to encourage the formation of loyal nuclei at Accomac and Hatteras Inlet were not successful. Perhaps the General's views were colored by his own experiences at Jacksonville.

When, however, larger areas or entire states had been redeemed, the efforts were more fruitful. After the fall of New Orleans, General Benjamin Butler proceeded to register all loyalists; later a military governor was appointed. In due course two Congressmen were elected and were seated by the House for a few days in February and March, 1863. In the next session of Congress, however, three claimants were refused admission, largely because members of the House disliked military domination in the election of Congressmen. Butler's successor, N. P. Banks, continued his efforts at reconstructing loyal government around New Orleans. Under Lincoln's one-tenth plan a state government was organized, but the radicals in Congress refused to recognize

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[51] *Id.* at 694-700.

[52] 2 SHERMAN, MEMOIRS OF GENERAL WILLIAM T. SHERMAN (1875) 266.

it. One of the chief arguments used by members of Congress was that the reconstructed state of Louisiana was merely a creature of the army.[53]

The reconstruction of Arkansas under the aegis of the army brought the same result. Army officials began in 1862 to register loyal persons and to urge them to form a Union government for the state. Then Lincoln appointed a military governor. Under the one-tenth plan, a new government was organized, also under army protection. Rebel raids into the state on election day made it absolutely necessary for the military force to protect the polls. Congress refused to admit Senators and Representatives from this state also. Among many other objections, it was maintained that the government was supported by bayonets.[54]

In Tennessee, Andrew Johnson was appointed military governor by President Lincoln. This state was invaded so frequently, had so many major conflicts fought on its soil, and was so bitterly divided between East Tennessee loyalists and Secessionists in the rest of the state, that Johnson's regime was almost completely military. It was not until 1865 that an elected government could function, and it was forced to lean heavily on the army for support.

Thus by the time the war ended, new state governments had been instituted largely through military effort in Louisiana, Arkansas, and Tennessee. The puppet regime which called itself the Government of Virginia at Alexandria would have had no existence except for military protection. None of these governments received the approval of Congress, except Tennessee; but such military efforts were important, even though Congress refused to dignify them with recognition. These militarily-supported regimes helped to encourage loyalists by providing them with a rallying point; and even more important, gave a semblance of civilian authority, removing at least in part the charge of naked military rule. For instance, the reorganized government of Arkansas could not have existed except for the army, and it worked under army protection; nevertheless it provided a modicum of civilian authority.

The Confederates, quite naturally, viewed these army-sponsored governments as traitorous. Had the word "quisling" been in use that early, the Southerners would have employed it to describe those who deserted the cause, took the oath, and helped to revive Union control in territory claimed by the Confederacy.

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[53]For the full story, see Russ, *Disfranchisement in Louisiana (1862-70)* (1935) 28 LA. HIST. Q.

[54]See Russ, *Presidential Disfranchisement in Arkansas (1863-1865)* in 1 SUSQUEHANNA UNIVERSITY STUDIES 185-97 (1940).

V. Establishing Radical Regimes under Military Reconstruction

After Appomattox the army was the sole source of governmental authority in the South. Acting as the agent of the Federal Government, it exercised complete political control because the victors refused to recognize any rebel state governments or any rebel officials. After the fall of Richmond, a move to recall the Letcher regime of Virginia was scotched by Lincoln. In Mississippi, Governor Clarke called the legislature into session, but it was disbanded by the Union army after an hour's time. Similar efforts in Alabama, South Carolina, and Florida were stopped by the occupying forces. Hence Sherman's terms of April 18, 1865, to Johnston were disavowed because they recognized the existing state governments.

Complete military rule ended with the establishment of President Johnson's state governments, but even then the army was still paramount. Military supervision was supposedly abolished, however, when Johnson proclaimed the end of the rebellion in ten of the Southern states on April 2, 1866, and in Texas on the following August 20.[55]

But Congress was not satisfied. In the military reconstruction acts of March, 1867, all the South, except Tennessee, was remanded to military authority. Johnson's state governments were declared to be illegal and provisional, subject to the power of five generals.[56]

In most cases the civil officials in each state were permitted to stay in office at least temporarily, although the army was supreme over them and took on more and more administrative duties.[57]

In accordance with the orders from Congress, the five generals proceeded to create ten radical governments based upon the enfranchisement of Negroes and the partial disfranchisement of whites.[58]

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[55]6 RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 (1899) 429-32, 433-38.

[56]The generals used this power freely. In Mississippi General Irwin McDowell removed Governor B. G. Humphreys, who was replaced by Brevet Major General Adelbert Ames and Attorney General Hooker, who was replaced by Captain Jasper Myers. Another army officer took the place of the elected Secretary of State. Humphreys refused to give up either the governor's office or the mansion, and was forcibly ejected by soldiers. See GARNER, RECONTRUCTION IN MISSISSIPPI (1901) 213-16.

[57]The most persistent opponent of military rule was Governor Jonathan Worth of North Carolina. He wrote a forty-page memorial to President Johnson protesting against military arrests, military trials, and submergence of the civil courts by military ones. Worth to Johnson, Dec. 31, 1867, 128 ANDREW JOHNSON MSS. 18637 (Library of Congress). See also Worth to Gen. E. R. S. Canby, Nov. 30, 1867, in 128 *id.* 18063-75, and Daniel G. Fowle to Worth, Nov. 28, 1867, in 128 *id.* 18627 *et seq.*

[58]See Russ, *Registration and Disfranchisement Under Radical Reconstruction* (1934) 21 MISS. VAL. HIST. REV. 163-181. For the process in Mississippi, consult Russ, *Radical Disfranchisement in Mississippi (1867-70)* (1935) 7 MISS. L. J. 365-78.

Subordinates registered all who could take the proper oath; those so registered then voted for delegates to constitutional conventions; the conventions rewrote the state constitutions; elections were held to accept or refuse these constitutions; and if they were ratified, officials were elected to man the new Negro-radical governments. But the army retained its authority until the very end, that is, until all elected officials had taken the oath and until Senators and Representatives had been admitted by Congress. Even after the new regimes had been set going, the military was often used to support them. It was not until 1877 that military support was removed from the radical governments of South Carolina and Louisiana.

Neither historians nor lawyers have ever been convinced of the constitutionality of this military government over the South after the rebellion had been proclaimed as ended. There was no question about the legality and desirability of military supervision of seceded areas during the war, because *silent leges inter arma,* if for no other reason; and there were other good reasons. But that military government should be established in time of peace is something else.[59] Those who opposed the military laws to reconstruct the South reminded the radicals that since the President had officially declared the rebellion to have ended, military government was unconstitutional. But it was a political and party matter, and the radicals were determined to have their way. In a legal sense, the restoration of military control reopened the rebellion. Attempts by Southerners to prove that the laws were unconstitutional failed because the Supreme Court did not dare to take up the dangerous issue.[60]

Granted, however, that Congress was determined to reorganize the South for partisan purposes, one can easily see why it turned to the army. It could not trust the civil officials who had been elected under Johnson's auspices; these men could hardly be expected to carry out

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[59]Perhaps the anomaly of this situation is nowhere better illustrated than in the case of Mississippi, when General Adelbert Ames, head of the military department of Mississippi, sent his own credentials to the Senate as the duly elected Senator of this state! The document read "I, Adelbert Ames, Brevet Major General U. S. A., Provisional Governor of Mississippi, do hereby certify that Adelbert Ames was elected United States Senator by the legislature of this state on the 18th day of January, 1870, for the unexpired term which commenced on the 4th day of March, 1869, and which will end on the 4th day of March, 1875. In testimony whereof, I have hereunto set my hand and caused the great seal of the state of Mississippi to be affixed this 25th day of January, 1870. A. Ames, Brevet Major General U. S. Army, Provisional Governor of Mississippi." GARNER, *op. cit. supra* note 56 at 275.

[60]Mississippi v. Johnson, 4 Wall. 475 (U. S. 1867); Georgia v. Stanton, 6 Wall. 50 (U. S. 1867). When in *Ex Parte* McCardle, 7 Wall. 506 (U. S. 1869), the Court had actually argued the validity of military reconstruction, Congress removed the case from the Court's jurisdiction.

laws that would have resulted in their own elimination from office. Moreover, the army had performed considerable administrative work during the war. Why not use it again? It had acted as policeman in dealing with disloyal individuals; it had served as clerk in giving the oath of allegiance to prisoners and deserters; it got new state governments going in Louisiana, Arkansas, and Tennessee. Radicals, forgetting the difference between war and peace, argued that if Lincoln could employ the military to organize governments, Congress could do likewise.

Summary

In summary, the following conclusions are justified from this survey of the army's governmental and administrative activities during the 1860's: (1) That in general an efficient job was performed in a trying situation, in spite of the fact that the personnel was untrained for such work; (2) That there were innumerable clashes between the civil and military authorities over arbitrary arrests, violation of the writ, trial by military commission, and so forth, but that such were to be expected because of the nature of the war; (3) That the attempts to create civilian governments, even though they were subservient to the military officials, bespeak one of the most fundamental aspects of American democracy, namely, that civil authority must be paramount, except in emergencies, and even then it must be as strong as conditions warrant; (4) That perhaps the least defensible phase of military administration was the use of the army to reconstruct the South after the war ended; and (5) That it was the army's reconstruction work during the conflict which gave to the radicals one argument—a poor one—for using the army for partisan purposes after the war.

OUR LOW ESTATE

*Phil Stone**

To those members of our noble profession who are entirely satisfied with themselves as lawyers and citizens, who are quite sure that the procedure of our state courts is perfect and cannot be improved, who still feel confident that we continue to hold in the eyes of the general public the high esteem which our profession once enjoyed—to them I say: "Read no further. You will be wasting your time."

I should say in the beginning (and I say it humbly and gratefully) that no man can have a higher opinion of our profession than I have. When I referred to our profession as a "noble profession," I considered that I was merely stating an obvious fact. From the standpoint of history with its record of the many struggles lawyers have made for the poor, for the unfortunate, for the unpopular, for the oppressed, with the many shining pages of the fights lawyers have led against tyranny, such praise is borne out. It is not too much to say that if it had not been for lawyers we might not have known such liberty as we now enjoy. From my own experience of twenty-five years in the active practice of law in many different courts I am borne out again, for there is no lawyer to whom his brother lawyers have been kinder, fairer, more patient and more considerate than my brother lawyers have been to me.

But I am disquieted—disquieted for two reasons.

For a number of years I have been making personal investigations as to the attitude of the laity toward our profession. The results of these investigations are both amazing and alarming. I am amazed to find how different is the attitude of the public toward lawyers from what such attitude should be. I am alarmed at how little aware of such attitude the members of our profession seem to be.

This situation, this lack of awareness on the part of the members of our profession, arises from the fact that lawyers are articulate (Alas! We are too much and too often articulate!) and most of the members of the general public are not. As a result of this, in every group comprising only one lawyer it is the lawyer who is inclined to do the talking and other members of the group are inclined (or forced) to do the listening. In fact, it is too often true that the lawyer will not let anybody else do the talking.

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Another reason for this lack of awareness on the part of the lawyers is that a layman may berate lawyers generally but that he will not do so before a lawyer or a group of lawyers. In the first place, he figures such statements made to lawyers will only involve him in an argument with trained arguers, an argument which he will lose not because he is wrong but because he cannot contend with the nimble sophistry of a profession trained to argument. Then, too, the average layman thinks it bad manners to berate a profession in the presence of a member of that profession.

But if you will listen, if you will be open-minded, if you won't argue, if you will be patient, if you will courteously press for answers to your questions, if you will insist to your lay friend that you want answers with the bark off, you will finally get your answers. I think those answers will shock you and disquiet you as they shocked and disquieted me. I think you will be amazed, as I am amazed, at how little most members of our profession realize how unfavorable is the opinion held of us by members of the general public.

In the first place, I find that a large number, probably a majority, of the people of Mississippi believe, and take for granted, that only a very few lawyers are honest. I find that most of them believe that we are somewhat like prostitutes, giving ourselves to any client for a price regardless of the justice of his cause. I find that most of them think we have no regard for justice, that we seek to accomplish our ends by any sort of pettifoggery, that we deliberately prevent justice being done. I find that most of them think we are lazy and unreliable. I find that most of them are disgusted at the slowness, the technicalities and the delay in our court procedure and are resentful toward us for those technicalities and delays.

It may shock you, as it shocked me, to find that the members of the general public think that most members of our profession are not honest. It may anger you. I am sure you know as well as I know how many times and how deservedly lawyers are trusted and how few members of our profession are ever faithless to a trust. But the public does not know it. We know there are always a few dishonest lawyers but we also know that there are always only a few. In twenty-five years I have had only four lawyers propose to me a dishonest course of conduct while I have had dozens of clients to do it. But the public does not know that. No matter how much we know that such an impression is a slander upon a noble profession the existence of such an impression is an actual fact and must be dealt with as a fact.

It should not shock us to know that the general public thinks we are

lazy. Most of us are lazy. We had just as well admit that charge and promise to do better. All of us know of members of our profession of whom we are extremely fond but who will never answer a letter.

We should also admit frankly to the public that sometimes all of us are dilatory and that some lawyers are always dilatory. But what we know and what the public does not know is that sometimes it is wise to be dilatory. We know that in the courts it is much better to be dilatory than to be sorry. We know that careful, thorough, painstaking investigation, both in and out of court, frequently saves both time and money. We know how necessary are the constitutional safeguards to prevent the possible invasion of property and liberty. It is our duty to see that the public not only knows this but understands it. It is our duty to take the time and the trouble to make the public understand this. If we to whom is committed the ark of justice will not exercise ourselves to make the public understand these things, surely no one else will.

Most members of the general public consider us a bunch of pettifoggers, seeking in all circumstances to obstruct or prevent justice for the personal benefit of our clients. The public will respect and trust us more if we frankly admit that sometimes this charge is well-founded. On the other hand, we know (as the public does not know) that there must be established procedures, careful investigations and a full and free presentation of all essential facts and issues if justice is to be done. But the members of the general public do not understand this as we do. We have not told them often enough and plainly enough why this is true. We know the bases and the history of the growth of the safeguards that protect private property and individual freedom but we have not taken the time and made the effort to educate the public as to these things we know so well that we take them for granted. Our position in the eyes of the public will continue to suffer as long as we fail to make these things clear to the public. They see only the lost time and they think it is stupid and inefficient. We must explain to the public over and over the basic conception of our Anglo-Saxon jurisprudence that our adversary system, with each advocate doing his very best and the judge and jury sitting as impartial umpires, is a rigid test, generally calculated to produce justice. We must also make the public understand that we do not claim that our legal system is infallible. We must admit frankly that it sometimes makes mistakes because its instruments are always human instruments and human instruments are always prone to err. We must cease to disgust the common sense of juries by wasting time proving facts which no one can deny, by urging flimsy technicalities. After twenty-five years of practising in the various courts I have become con-

vinced that the lawyer who objects the least usually fares the best at the hands of the jury.

I wonder how many members of our profession realize how seething and widespread a revolt there is among the members of the general public against the technicalities and delays of court procedure. Do you know how a busy farmer, merchant or doctor feels when he has to leave his business to come to court as a witness, hang around all day without the case being tried and is then told, without explanation, to come back another day? A prominent North Mississippi surgeon laughingly says that sometime he is going to get a lawyer on the operating table, cut him open and then tell him to come back at nine o'clock next morning. Do you realize that nobody bothers to explain to this witness why such delay is justified, if it is justified? Often it is not justified. Intelligent calendaring of cases could prevent most of this.

Do you know, really, what your client thinks about a system that may make him wait for four or five months even to find out what his adversary claims as a defense to the suit? Do you know what he thinks when a mere plea of general issue is filed and you are required to prove laboriously for him facts which he knows that everybody in the courtroom knows to be true? Do you know what he thinks about a system that makes him wait eighteen months or two years for a final decision in his case? Do you think that because of his usual calm demeanor that he is not bitterly resentful toward such a system, is not seething with discontent about it? If you think that he is not, my brethren, you are in for a rude awakening. If such a system prevailed in another business or profession we would see at once how absurd and anachronistic it is.

Well, what are we going to do about it? I should have said what, if anything, are we going to do about it? For I lean to the opinion that probably we are not going to do anything about it, that we are just going to sit around and do nothing about it until a disgusted and aroused public does it for us, as happened in England during the last century.

I think there are two things we can do about it. The first of these things is to educate the public as to the facts concerning lawyers and the legal profession. The second of these things is to modernize our court procedure, especially the procedure in our circuit courts.

What shall we say to the public? As old Tom Foley said to his youthful protégé, Al Smith, on the entrance of the latter into politics: "If you tell them anything, tell them the truth." Let us be sure to scrupulously and accurately tell them the truth. Let us tell them frankly that there are a few lawyers who cannot be trusted but that there are

very few. Let us tell them that there are lawyers who will serve any cause for hire, will bring any sort of suit, will represent any sort of client, will fight bitterly against the general public interest for a few pieces of silver. But we must tell them that most lawyers are not like that and let's explain to them that no man should have his case prejudged; explain to them that it is his fundamental right as a free man to be represented in court by a lawyer of his own choosing. Let's admit that lawyers do sometimes waste time and are sometimes too technical, but let's explain to them why it is necessary to proceed slowly sometimes in order that haste may not produce injustice. Let us explain clearly to them how established formal procedures protect their property and their lives, tell them that such established procedures have sound historical reasons for their existence and tell them in detail what such reasons are. Above all, let's tell them that we are going to clean our own house and then prove it by doing so.

Balzac said that the nineteenth century was the century of money. It is equally true that the twentieth century is the century of advertising. My first suggestion for educating the public to the true virtues of our profession and of its members is quite simple. It is to advertise.

I know that it is considered most unethical for the members of our profession to advertise. I know, too, that a good many lawyers in Mississippi are, by word of mouth, doing it or having it done for them all the time. As a prominent Vicksburg lawyer pointed out to me, listing in a legal directory is nothing but advertising. Do you know what the members of the general public think about our attitude toward advertising? They think it is hypocritical or stupid, or both. I think our trouble does not lie in the fact that we fail to advertise but that we do not advertise in the right way and do not advertise enough. Like it or not, we had just as well quit trying to live in the eighteenth century and had just as well admit that our profession is not only a profession but that it is also a business. If it were not a business, it could not be a profession very long.

What could be wrong in a series of simple, well-written advertisements, published not by individual lawyers but by the State Bar Association? My short experience as a member of the State Bar Commission has shown me how impossible it is to cleanse our profession merely by direct action in disbarring certain unethical lawyers concerning whom complaint has been made to us. In Mississippi we are too personal. We know one another too well for such a method ever to succeed in thoroughly cleaning the ranks of our own profession. But we could advertise such lawyers out of business. The State Bar Association could run advertisements in the various local newspapers setting out a list of things

that no reputable lawyer would do and could drum this list over and over into the mind of the public. If you or I say that some lawyer is dishonest, the general public is likely to think that we are just jealous. But the general public could not very well think that the State Bar Association was jealous if it said so. Our Association could publish advertisements to the effect that it is unethical for a lawyer to solicit business, could warn the public against the lawyer who solicits business, could say that the successful and competent lawyer does not solicit business, that he does not have to do it. You will be amazed at how few laymen know that it is unethical for a lawyer to solicit business. A short time ago I found a president of a bank, a man who has been successful not only financially but who is an honorable Christian gentlemen, who did not know that it was unethical for a lawyer to solicit business. If this is true of a man of his type, what can you expect of the average run of laymen? Yes, we have been telling one another for centuries that it was unethical for us to solicit business; but have we been telling the general public?

You and I know that many dollars and many heartaches would be saved if people would have competent lawyers to draw their deeds and wills, to examine their titles before they buy real estate. We know that actually we make more money because people will try to draw their own deeds and wills. But when an individual lawyer tells an individual layman this, the layman will think the lawyer is just trying to make more money out of him. But our State Bar Association could educate the public along this line by a series of advertisements. No doubt the law publishing companies would be glad to co-operate with a series of advertisements along the line of the "see your doctor first" advertisements of the larger non-pharmaceutical houses.

These advertisements could also explain to the more uneducated of the general public that most fees charged by lawyers do not run too high, could explain in simple language how constant and frequently how burdensome is the lawyer's overhead, could make it clear that he sells knowledge and experience frequently worth to the buyer many times what the buyer pays. There could even be a series of advertisements showing what the fee for certain common types of legal work should be in certain areas and could explain why these fees are what they are. They could drum into the public mind week after week that in this world we get only what we pay for. Lastly, they could advise the entire lay public where to make complaints over any unethical dealing by any lawyer and how to make such complaints.

I believe such a series of advertisements could be made to solve many of our problems of professional ethics and discipline. Certainly

they would bring about a better feeling between our profession and the general public. But they will not solve the most pressing of our problems.

That most pressing problem is the public disgust at the delay and technicalities of our court procedure. Unless we do something about these, all of our words will fall upon deaf ears. The laymen will be so preoccupied with seeing what we fail to do that they will not be able to hear what we say. Can we not get a majority of our brethren to realize that the procedure in many of our state courts is fifty years behind the times? Can we not get a majority of them to realize that if we do not reform our court procedure, either we shall have it reformed for us by an outraged public unfamiliar with legal history and bases or that our courts will wither away to be succeeded more and more by administrative bodies? The last is already beginning to happen and merely inveighing against it will accomplish nothing. The only way to check the growth of administrative bodies is to make our courts function more cheaply, more efficiently and more promptly.

It is true that our chancery courts function reasonably well. Some few slight reforms, such as shortening the time for the probation of claims, providing for the trial of more cases in vacation, and things like that, might help. But the main trouble is in our circuit courts.

Can anybody furnish any sensible argument for the retention of the ancient plea of general issue? In what way does it help to promote justice? Why not substitute for it an answer with specific denials and admissions? Why on earth should we take up the time of our courts to prove facts that cannot truthfully be denied? Many of us may think that it is all right to have five months within which to file a plea of general issue and then to defeat a just recovery by springing some defense that our opponent did not anticipate. We may think that it is smart but believe me, my brethen, the lay public does not think it is smart. The public thinks it inexcusably stupid, as it obviously is. It is not just our money that we waste in such ancient and meaningless skullduggery; it is the money and the time of all the public. The elimination of the plea of general issue and the substitution for it of the answer of specific admissions and denials would save from ten to twenty-five percent of the time spent in trying a lawsuit in our circuit courts with the consequent saving of thousands of dollars to the taxpayer and the saving of many hours to the busy lawyer. Do you think that this is too optimistic? Ask those lawyers who have tried the system in the federal district courts and in states where the plea of general issue has been abolished. And yet we could not even get through the recent legis-

lative session a simple bill to abolish the plea of general issue! How can we expect the general public to listen to what we say?

Why should we be compelled to bring witnesses many miles and to keep them hanging around many days in idleness just to prove something that would be impossible for our opponent truthfully to deny? Why can't we have the simple admission rule as laid down in Rule 36 of the Federal Rules of Civil Procedure? How can we afford *not* to have it? Is there any sensible reason why we should not have such a rule? Can any such reason be advanced by anyone in favor of making justice cheaply and quickly and easily obtainable? If there is such a reason, I have not yet heard it stated.

When you file a lawsuit in the circuit court, what sense is there in having to wait many months, sometimes nearly six months, before you can even tell your client what the defense to his lawsuit will be? Rule 12(a) of the Federal Rules of Civil Procedure requiring an answer in twenty days after service has not done any great amount of injustice so far as I have been able to see. If it really works a hardship on a lawyer to file his answer in twenty days, he can always get an extension of time from the district judge. Usually he can get such extension from opposing counsel simply by agreement. I have noticed that some lawyers complain about having to answer in twenty days but that most of these always manage to get their answers filed within that time. Why can't we have the same rule in our circuit courts? If we had such a rule, think how many more of our civil cases would be tried at the return term. And, brethren, if we just tried more of them at the return term, it would not be many years before we would have many more lawsuits to try. When a client has a lawsuit filed, he wants it tried. If he did not want it tried, he would not employ a lawyer to file the suit.

In some of the rural counties of our state there is much complaint about the decline of litigation in the circuit courts. This is what has happened to it. Civil cases are not tried, as a rule, within any reasonable time and few clients care to file a lawsuit that may not be tried for a year or two years. They had rather accept an inadequate and unjust settlement and forget about the whole thing. We can reverse that trend in a few years if we will try more civil cases at the return term. But we can not try many of them at the return term unless we abolish the plea of general issue and require the answer to be filed within a shorter time than from three months to six months. It is impossible for the best of lawyers always to guess every possible defense, and the best of lawyers cannot at a moment's notice produce witnesses to rebut a defense that was not anticipated. I wonder if you realize how stupid the public considers us for not correcting so obvious a situation.

Why should we take up the time of the court and the jury to prove minor matters, many of which are essential to be proven under our present system of procedure? Why should we not get down at once to the basic issue or issues by the use of compulsory pre-trial procedure? Frequently by agreement, lawyers do this, thus eliminating much lost motion. But suppose the other lawyer will not agree to it? Why not give the court power to make us do it? Much time and effort and money would be saved and we would find it much easier to try our lawsuits. Also we would find that we would be more successful in winning our lawsuits, provided we begin with a good lawsuit. If we begin with a bad one the public thinks we should not win it. The public is right. Such procedure works all right in the federal district courts.

Why can we not have in our circuit courts the deposition and discovery practice that we have in our federal district courts now? Why can we not have the sensible third party practice that is possible in the federal district courts? Why take three lawsuits to settle something that could be settled more quickly and more justly in one lawsuit?

There are many things that we need to do to improve our circuit court procedure, and I have never yet heard any good reason as to why we should not do all of the things suggested above. We can talk all we want to the general public but it will be of no avail until we, the lawyers, inaugurate the reforms that the members of the general public know by their common sense should be inaugurated. In order to gain the confidence of the general public we must make what we do speak as loudly as what we say. The general public can be educated into a deservedly favorable opinion of our profession, but we must act before we talk.

In the words of Walter Clark, North Carolina's fighting liberal judge:

> "The law should express the best sentiment of the age. It should move, because all the world besides is moving. We should move up abreast of our age and not take our seats by the abandoned campfires of a generation gone before."

The time, my brethren, is later than we think.

THE RETIREMENT OF JUDGES

*W. E. Morse**

The enforcement and interpretation of law are the function of the judiciary. Law is vastly different from laws. Law represents the whole structure upon which our government rests. Laws are made by the legislative bodies, but the quality of law or justice depends more upon the quality of the man who administers the law than on the contents of the law he administers.

It has been said that the judge's duty is not to make a present of justice, but to give judgment. He is sworn that he will administer justice without respect to persons and to do equal right to the poor and to the rich, and that he will faithfully and impartially discharge and perform all duties incumbent upon him, according to the best of his ability and understanding, agreeable to the constitution of the United States and the Constitution and laws of the State of Mississippi.

County judges, chancellors and circuit judges must have had five years' experience as a practicing lawyer, and must have attained the age of at least twenty-six years and have been a resident citizen of the State of Mississippi for five years. The justices of the Supreme Court must have the same qualifications and have attained the age of thirty years at the time of their appointment or election.

All judges are elected by the people in our state. The Supreme Court's tenure is for eight years, and all others are for four years. The courts of record are the county court, circuit and chancery courts, and the Supreme Court.

The continuity of our public institutions is largely dependent upon the judges, and they must maintain their independence; they must be well-trained in the traditions of the law, and must be strong men and strong lawyers, and men of experience and reason.

The State of Mississippi is very fortunate in having an elective judiciary. The policy of the state is to continue to re-elect a man if he is fair with the public and if he can keep up with decisions and with the changing times. The people of the state of Mississippi have not been disturbed by foreign element. It is the native stock that has lived here for years and years. We understand each other; we understand the common problems. Our judges are grounded in common law. The strong judge who knows the law knows how to attain the end sought

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*Jackson, Miss.; member of Hinds County Bar, Mississippi State Bar, and American Bar Associations.

for the law, and he is not afraid to do things which a mediocre judge would be too mistrustful of himself to attempt.

Practically the entire workings of the court are in interpreting and judging relations between man and man. This does not attract the attention that criminal cases do, but nevertheless the chief concern of the court is in the every-day work in cases where men have been unable to agree with one another.

There has grown up of recent date the administrative law. The Federal Government was one of the first to seize upon this administrative force to settle controversies. Administrative law is here to stay, but these matters should be subject to review by the courts; and, to meet these changing conditions and this creative work arising out of administrative law, the courts must, within constitutional and legal limits, work out these problems wisely, and it calls for the strongest judges and the strongest lawyers that we can have upon the bench.

I do not know in my own practice of a judge in the court of record having been impeached. I checked the Mississippi Digest, and I do not find any case of this kind. This speaks volumes for the judges of the state, where they adjust and pass upon controversies every day of the week. Both the legislative and administrative branches of the government reward their friends for their political support. This is not true with the judiciary, and that is one reason for its stability.

Judicial salaries in the State of Mississippi do not even approximately equal the income of the ablest lawyers. The State of Mississippi has lawyers of the highest talent on the bench; the question of income seems to have been only a small factor in entering into the choice. Many men who make wonderful judges will not make good lawyers. Most judges have ethical instincts above the average lawyer, and they seem to be less interested in getting wealth and power, and are more interested in public service than in public relations. The deterring factor for many able lawyers' becoming judges is the insecurity of the position. Many able lawyers serve a short time as judges and then get out into the active practice.

The independence of the judiciary is the principal strength of it. The average judge hates to think that after he has served a term, he might be thrown out of office. The salary he had received does not permit him to save. He is dependent upon the salary. He has no outside connections; he does not engage in business enterprises on the side; and as a consequence, if he is thrown out of office, he has to start from the beginning. This, to a middle-age lawyer, is something to be regarded

with trepidation. He does not mind for himself so much as he does for his family.

A great many of the states are providing for retirement of the judges. Such a plan is more common among the older and wealthier states. Nine of the original thirteen colonies have such provisions. The four of the original colonies that do not are New Hampshire, Delaware, South Carolina and Georgia. The United States Government has a plan for the retirement of judges and twenty-five of the forty-eight states have such a plan in one way or another. The principal objection seems to be the cost; and this seems to have been a good objection, unless the advantages that may be expected to accrue to the community are worthy of the expense.

The State of Mississippi has had disability and relief for firemen and policemen since 1930.[1] Old age disability and pensions have been established for people all over the United States by the Federal Government. The judges are our true, trusted and tried stabilizers of our government, and we owe it to them to project a plan by which they could feel free and independent to be absolutely impartial between man and man. We owe it to ourselves and to our children to protect the judiciary so that they can continue to be true and independent.

There appear to be two types of pension—the superannuation pension, and the disability pension. The superannuation pension is generally based on the double requirement of age and length of service. The federal system under which a federal judge may retire at seventy, after ten years of service on full pay for life, is one type. The compensation pension is normally paid for the remainder of the retired judge's life, and varies from one-half to the full amount. The service requirement varies greatly, with most states requiring ten years. The most common age requirement is seventy. Retirement for disability generally provides for retirement regardless of age or length of service.

Several years ago, Senator Robert Hauberg, of Hinds County, introduced a bill to retire from full service and place on the retirement list judges of the county, circuit, chancery and Supreme Courts. This bill was based on service of twenty-two years, and a judge's having reached the age of seventy-two. This list was to be known as the Preferred List of Special Judges, and these judges might be called back for special cases. This was drawn with the idea to meet the constitutional requirement, that no pensions can be given, and that only services rendered could or should be paid for.

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[1]Miss. Laws 1930, c. 55.

Evan Haynes, professor of law in the School of Jurisprudence of the University of California, has recently written a book entitled *The Selection and Tenure of Judges*. He gave permission to quote from his work, and I am including herewith the data as a summary of the various plans in force throughout the United States.

FEDERAL COURTS

Superannuation only: All judges holding office during good behavior, 10 years' service, age 70, full pay for life. (Judicial Code, sec. 260; 28 U.S.C. 375.)

ARKANSAS

Superannuation only: Supreme Court justices, 10 years' consecutive service, age 70, ½ pay for life. (Acts 1941, No. 262, p. 641.)

CALIFORNIA

Superannuation: Judges of Supreme Court, District Courts of Appeal, Superior Courts and Municipal Courts, 10 years' service in any of said courts within 15-year period, if age 70, or 20 years' service in any of said courts within 24-year period if age 65, (or certain other combinations of service in appellate and lower courts), ½ pay for life.

Disability: Same judges. If governor finds a judge is mentally or physically disabled, he may, with consent of the commission which approves appointments to Supreme Court and District Courts of Appeal, retire the judge on half pay, if judge is qualified to retire voluntarily, or, if not, on ½ pay for 5 years plus a period equal to half the time by which his judicial service exceeds 5 years. Any judge retired for disability who practices law before age 70 loses his pension permanently. The pension of any retired judge who thereafter receives compensation as a public officer is reduced by the amount of such compensation so long as it is received. 2½% of the salaries of all judges affected is deducted and paid into a retirement fund. (Stats. 1937, pp. 2204, 2206; Stats. 1939, c. 993; Stats. 1941, pp. 2936, 2939.)

COLORADO

Superannuation only: Supreme Court justices, 10 years' service, age 65, $3,000 per year for life. (Laws 1939, c. 96.)

CONNECTICUT

Superannuation only: Judges of the Supreme Court of Errors and of the Superior Court age 70 (no service requirement), become state referees to hear and report cases to the Superior Court, $8,000 per year for life. Any state referee who has served 20 years continuously

in one or more of certain courts, (Court of Common Pleas, District Court, Superior Court, or Supreme Court of Errors), receives ⅔ the pay of a Superior Court judge for life. (Pub. Acts 1921, c. 23; Pub. Acts 1927, c. 274.)

Section 170 of the General Statutes provides for retirement of all state employees, after 30 years' service, or 20 years' service at age 70, at ½ of average salary for the past five years.

Laws 1937, Sec. 61e: "Each widow of a judge of the Supreme Court of Errors or of the Superior Court or a Court of Common Pleas or of a state referee shall receive, monthly, an allowance equal to twenty-five per cent of the salary which her husband was receiving at the time he ceased to hold the office of judge . . ."

FLORIDA

Superannuation only: Supreme Court justices 20 years' consecutive service, age 65, full pay for life. (Fla. Stats. 1941, 25:12.) Circuit Court Judges, 12 years' service, if age 60, or 20 years' service regardless of age, ⅔ pay for life. (Fla. Stats. 1941, 38:14.)

ILLINOIS

Superannuation: Judges of courts of record, 12 years' service, in one or more of said courts, age 60, 25% for life, plus 25/72 of 1% for each month of service credit in excess of 12 years but in no event will annuity exceed 50% of final rate of salary. (Laws 1941 (Vol. 1.) No. 470, p. 527.)

KENTUCKY

Superannuation: Judges of Court of Appeals, 10 years' continuous service, age 65, $5,000 for life.

Disability: Judges dealt with above, after 16 years of service, may retire himself for ill health, physical incapacity, or impaired health, $5,000 for life. (Acts 1940, c. 313, p. 528.)[2]

LOUISIANA

Superannuation: Judges of Supreme Court, Court of Appeals and District Court, 20 years' continuous service in a court of record, age 70, ⅔ pay for life. All judges must retire at 80, no pension unless served required length of time. (Const. Art. VII, Sec. 8.)

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[2]In Talbot v. Thomas, 286 Ky. 786, 151 S. W. (2d) 1 (1941), the act was held unconstitutional. See Note (1942) 31 Ky. L. J. 72 for discussion of decision.

Disability: Same judges. If a majority of the Supreme Court certify that a judge is physically or mentally incapacitated, he is retired on ⅔ pay regardless of age or length of service. (Const. Art. VII, Sec. 8.)

MAINE

Superannuation only: Justices of the Supreme Judicial Court and Superior Court, 7 consecutive years' service, age 70, eligible for appointment as active retired justice, ¾ pay for life. If 70 and has served 7 consecutive years and continues to serve for more than one year, he waives right to such retirement and shall make no claim thereto no matter how term ends. (Rev. Stats. of Me. (1930) c. 125., Sec. 5, p. 1515.)

MARYLAND

Superannuation only: Judges of Circuit Court of any county or Supreme Bench of Baltmore, City or Court of Appeals, age 70, 10 years' service, or at age 60 while in office after serving 20 preceding consecutive years, $3,000 per year; if served less than 5 years, receive $2,000 per year. (Laws 1941, c. 390, p. 647; Sec. 48, Art. 26, Ann. Code of Md. 1939, repealed, reenacted with Amdts.)

MASSACHUSETTS

Superannuation: Judges of many courts, age 70, 10 years' service, ¾ pay. (Ann. Laws of Mass. Cum. Supp. 1942, c. 32, Sec. 65a.)

MICHIGAN

Superannuation: (Formerly) Justices of Supreme Court, 10 years' service, age 70, ½ pay for life. (Public Acts 1929, No. 307, p. 817.)

Above act repealed: (Public Acts 1933, No. 83, p. 100.)

Disability: Circuit Court judges, 24 years' service, age 70, plus "physical incapacitation," $1,800 a year. Request for retirement must be made within two years after passage of this bill. (Public Acts 1929, No. 91, p. 234.) No provision was made in 1933 for the continuation of the act, which apparently died by its own terms.

MINNESOTA

Superannuation: Supreme and District Court judges, 25 years' continuous service in either or both, over 70, ½ pay for life. District Court judge, 25 years' continuous service, or Municipal or Probate Court, over 70, ½ pay for life. (Minn. Stats. 1941; 490.02.)

Disability: Supreme or District Court, mentally or physically disabled, receive compensation to end of term. Supreme Court justice, 25 years' continuous service as justice or commissioner or either, age 70, ½ pay for life. District Court judge, 25 years' continuous service on District, Municipal or Probate Court or either, age 70, ½ pay for life. (Minn. Stats. 1941; 490.11, 490.12.)

MISSOURI

Disability only: A judge of any court of record may be deprived of power to hold court if disabled, and apparently keeps his active salary during the period of his disability, but presumably not beyond the end of his term of office. (Rev. Stats. 1939, Sec. 2040-2044.)

NEVADA

Superannuation: Supreme and District Court judges, on either or both courts, 20 years' aggregate, age 70, ⅔ last year's salary for life, or so long as he remain a resident of Nevada. (Nev. Comp. Supp. 1931-41, Sec. 4881:01.)

NEW JERSEY

Superannuation: Chancellor, Vice-Chancellors, justices of Supreme Court, and judges of Circuit Court or Court of Common Pleas, 14 years' judicial service, age 70, ½ pay for life. (Rev. Stats. 1937, Secs. 43:6-1 to 43:6-6.) Associate justices of Supreme Court, 20 years' service, age 68, if not reappointed, one-half pay for life. (Laws 1929, c. 3, p. 15; Rev. Stats. 1937, Sec. 43:6-7.)

Disability: Same judges, ½ pay for life regardless of age or length of service, if retired because of physical or mental incapacity developed during term of office. (Rev. Stats. Secs. 43:6-1 to 43:6-6.)

NEW MEXICO

No statutes applying directly to judges. State retirement statutes provide that every person who has served the Territory and State of New Mexico for 30 consecutive years who has passed the age of 65 years shall receive $125 per month for the rest of his life. (Laws 1941, c. 110, p. 175).

NEW YORK

Superannuation: All New York judges must retire at 70. (Const. Art. 6, Sec. 19.)

Formerly, judges of any court of record were eligible for appointment as referees. Appointment was not a matter of right; and in practice,

it is said, was not a matter of course. Moreover, the power that appoints referees (the Appellate Divisions) might also remove them. (Judiciary Law, Sec. 115.) The statute has been extensively added to and altered since its original enactment in 1895, and is very complicated. The service requirement varies from 5 to 28 years for judges of different categories. The age for retirement varies from 60 to 70 years, compensation varies from $6,000 per year plus $1,500 for expenses for life to $10,000 per year plus $2,000 for expenses for life; all presumably subject to termination in the event of removal.

In 1939, it was provided that no such referees shall be appointed hereafter. (Laws 1939, c. 907, Sec. 4; Judiciary Law, Sec. 125.)

Judges of Court of Appeals and of Supreme Court removed by concurrent resolution of both houses of Legislature if ⅔ concur; if removed for any cause not involving moral delinquency, ½ salary be paid to end of elected term, or until 70, or stop at death, but not to be paid more than $3,000 per year and all this only if recommended by the Legislature. (Thompson's Laws of N. Y. 1942 Cum. Supp., Laws 1941, c. 290, Sec. 16.)

NORTH CAROLINA

Superannuation: Justices of Supreme and Superior Courts, 15 years' service in both, or 12 years' consecutive service in the Supreme Court, retirement at end of term, age 65, or 25 years' service (need not be consecutive), age 69½, ⅔ pay for life. (Code, Sec. 3884a.)

Disability: Judges of Superior and Supreme Courts and presiding judges of inferior courts may be removed for mental or physical incapacitation upon concurrent resolution of ⅔ of both houses of the assembly. (Const. Art. 4, Sec. 31.) Judges of the Supreme and Superior Courts who become totally disabled after 6 years' service and retire (or, no doubt, who are retired), receive ⅔ pay for life. (Code Sec. 3884a, as amended by Laws 1937, c. 199, Laws 1939, c. 258.)

OHIO

Superannuation: Under State Retirement Act, age was 70 until 1939, after that age 60; 36 years of service; sum received worked out on basis of pension and annuity. (Ohio Code 1940, Sec. 486-32.) Elective officials may become members of Retirement System. (Laws 1941, Sec. 268, p. 150.)

PENNSYLVANIA

Superannuation: (Formerly) Any judge who had served in judicial office for 20 years, no age requirement, became special master or

referee, ½ pay for life. (Pamphlet Laws 1919, p. 461, Sec. 2; Stats. 1920, Sec. 12744.)

Disability: (Formerly) All judges could be retired either on own or by governor if mentally or physically incapacitated. If he stood ready to perform the duties of referee so far as able, he received full pay for the remainder of his term. (Pamphlet Laws 1919, p. 461, Sec. 1; Stats. 1920, Sec. 12743.)

In 1929, the judges were included in the State Employees Retirement System. The above acts relating to judges were repealed. Under the present system a judge may retire after having served as a state employee for 20 years or more, age 60, if in opinion of Governor he is incapacitated or disabled from performing duties; not to receive more than ½ final salary.

If under superannuation retirement age and certified disabled by a designated physician after 5 years' service, may be retired; retirement allowance based on number of years of service; not to be less than 30% of final salary. (Purdon's Penn. Stats. 1936, Tit. 71, Secs. 1711, 1712, 1713, 1742; Amended by Session Laws (1937) No. 179, p. 683; Laws (1941) No. 88, p. 202.)

RHODE ISLAND

Superannuation only: Supreme and Superior Court justices 25 years' service or 15 years' service plus age 70. Pension varies with position. Chief Justice of Supreme Court, $9,000; Associate Justice, $8,000; Presiding Judge of Superior Court, $8,500; Associate Justices of Superior Court, $7,500; all for life. (Gen. Laws R.I. (1938) c. 497, Sec. 2.)

District Court judges, 15 years' service, age 70, compensation: "The general assembly shall annually appropriate such sum as it may deem necessary." (Gen. Laws (1938) c. 500, Sec. 41.)

This state by special acts sometimes provides for judges who, perhaps, do not come within the above provisions. Thus in 1929, the legislature retired the Chief Justice of the Supreme Court at a pension of $11,000 for life. (Acts & Resolves 1929, c. 1333, p. 112.) By another special act, an associate justice of the Superior Court was pensioned at $5,000 for life. (Acts & Resolves 1930, c. 1551.)

Under amendments to Pension and Retirement System for State Employees judges of Supreme and Superior Courts are excluded from provisions of the Act, but judges of District Courts in the service of the state for 5 years, directly preceding June 3, 1935, and whose services were terminated during 1935, entitled to certain pension, if 60 or when they reach 60. (Laws 1941, c. 1048, p. 171.)

TENNESSEE

Superannuation: Judges of courts of record, 24 years' consecutive service, receive for life, salary entitled to if he had continued to serve; 16 years' consecutive service, age 70, receive for life, salary entitled to if continued to serve. (Pub. L. 1941, c. 44, p. 137.)

Any former judge of Circuit or Chancery Courts, served 19 years, age 75, entitled to ½ pay for life. (Laws 1939, c. 158, Sec. 1.) A former judge who served in any trial courts 20 consecutive years next preceding discontinuance of service, age 70, entitled to ½ pay for life. (Laws 1939, c. 46, Sec. 1.)

Disability: Any judge of a court of record, 20 years' consecutive service, permanent disablement, full pay for rest of term. (Code of Tenn. 1932, Secs. 9910-9912.)

VERMONT

Under the State Employees Retirement System which has been established no employee is to receive more than 50% of any monthly salary. Judges are not mentioned in the Act. (Laws 1941, c. 206, p. 275.)

VIRGINIA

Superannuation: Judges of the Supreme Court of Appeals, 10 years' consecutive service as judge in that court or the Circuit, Corporation or City court of record, age 70, ⅔ pay for life. (L. 1938, c. 224, p. 355.) Any ex-judge, or judge of any Circuit, Corporation, and some City courts which may be abolished while he was serving, who served 15 years, age 70, receive $900 a year for life. (Laws 1942, c. 357, p. 535.)

Disability: Circuit, corporation and some city court judges, age 65, who served not less than 7 years in above courts, or any two of them, permanently disabled, receive ⅔ pay for life. (Laws 1942, c. 368, p. 558.) Judges coming under above retirement provisions and Virginia Code Secs. 3463, 3775, or 5978a to contribute certain percentage of salary to retirement fund. (Laws 1942, c. 441, p. 705.)

WEST VIRGINIA

Superannuation: (Formerly) Judges of Supreme Court of Appeals, 12 years' consecutive service, age 65, $6,000 per year for life. (W. Va. Code 1931, c. 51, Art. 1, Sec. 15, p. 1284.)

Repealed: (Acts of W. Va. Legislature, Extraordinary Session 1942, c. 5, p. 7.)

WYOMING

Superannuation only: Supreme Court judges, 24 years' continuous service, age 70, $4,000 per year for life. (Rev. Stats. 1931, Sec. 31-116, p. 553.)

This matter is one that should have discussion and consideration by the judiciary and by the lawyers. The lawyers should take the lead in the matter, as they are officers of the court. Now appears to be a good time for the State of Mississippi to make this great step forward. We have money in the treasury, and this is one of the most worthwhile things that the money could be spent for. By strengthening the judiciary, we help our own state. By building the law of the state, we build stronger and more enduring structures than pyramids, coliseums, or stadiums.

This is a matter which should not be left to the judges, and I am simply writing to bring it to the attention of the Bar of the state and to the members of the Legislature.

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BOOK REVIEW

WOODROW WILSON AND THE LOST PEACE. By Thomas A. Bailey. New York: The Macmillan Company, 1944. Pp. xii, 381. $3.00.

Dr. Thomas A. Bailey, Professor of History at Stanford University, has written a book designed to help Americans and their representatives act with vision in framing the peace to follow World War II. He hopes, with people everywhere, that the next peace will be framed better than the one of 1919, and that in his book he may have exposed past errors in such a way that they may not be repeated when men come to the stupendous task of planning the peace following the present war.

The author covers the period from the outbreak of the war in 1914 through the signing of the peace. Dealing with problems and facts of the background of the Peace Conference and pointing to the unexampled role of Woodrow Wilson, the author tells an engaging story, concluding, as many others have done, that "we won the war but lost the peace."

Especially important is the emphasis upon the American people as they, through public opinion, affected the Peace Conference with its tragic outcome, and as they were in turn affected by the results of the peace.

Although not all the book is given to a discussion of blunderings and failures, a sampling of the headings of the twenty chapters of this book shows, with the title, the direction of the author's argument: "The Road to War," "The Armistice That Was Not An Armistice," "Blundering Beginnings," "Open Disagreements Openly Arrived At."

President Wilson as is well known has been criticized for not taking with him to the Peace Conference one or more of three prominent Republicans: "Charles Evans Hughes, Republican presidential standard bearer in 1916; or ex-President Taft, an outstanding advocate of the League of Nations; or Elihu Root, a former Secretary of State, a friend of international collaboration, and the distinguished elder statesman of the party." Dr. Bailey is of the opinion that Wilson did make a mistake in not appointing one or more of these men, and that one of his strong objections to them was that "they were all distinguished lawyers . . . and Wilson had a deeply ingrained dislike for the narrow mental processes of the legal profession." Dr. Bailey, an historian and not a lawyer, seemingly accepting a kind of criticism which lawyers are accustomed to hearing from many persons, competent and otherwise, in other professions, continues by saying: "He wanted to work for a broad, sweeping program, and did not care to be constantly annoyed by the realistic and legalistic objections of the precedent-bound 'library lawyers.' He bluntly told

Robert Lansing, himself a lawyer, that he did not intend to have lawyers drafting the treaty of peace. Lansing was hurt." Dr. Bailey does not suggest that Wilson should have selected Henry Cabot Lodge or Theodore Roosevelt to go to the Peace Conference, but he calls attention to the fact that he might have taken Taft or Hughes or Root, who, though strong partisans, were perhaps not narrow and bitter partisans. It is pointed out, however, that during the summer and fall of 1918, Root, Hughes, and Taft had all three made speeches attacking the Administration.

Enlivening the story at this point, historian Bailey says:

> "Wilson himself was a strong partisan and a good hater. Born a democrat—a Southern Democrat—in the state of Thomas Jefferson, and dedicated to the principles of Thomas Jefferson, he believed that Republicans were tolerable people, but not to be trusted too far in high places. He believed in the two-party system: one party governing, the other watching—with the Republicans doing the watching."

The machinery of the Conference being set up, what should be the plan of procedure, what subjects should be taken up, and in what order? There was the pre-Armistice "contract" embodied in the Fourteen Points. Only the French, the author says, had a carefully outlined plan for the agenda. The British had none, he says, and "the United States not only had none, but Wilson had quashed all attempts to frame one or to agree upon one." And he adds: "It may well be argued that his great error was not in going to Paris but in going without a plan."

Not all of the author's attention is given to Wilson. In the chapter entitled "The Olympians," the author writes interestingly of the Big Four: of Clemenceau, the realist, clashing with Wilson, the idealist, at regular intervals; of Lloyd George, the magnetic Welshman with a scintillating mind who used it as a substitute for hard work, and who was "as reliable as quicksilver, as direct as a zigzag, as unwavering as a weathercock"; or Orlando, the "weakest of the four representatives, both in personal and political force."

Dr. Bailey has written a good book. Neither Wilsonians nor anti-Wilsonians will like all of it. The author in his foreword calls up both groups "to shed the scales of prejudice from their eyes"; for in doing so, "we are privileged to hope that this great nation will not again plunge the world into despair by the spectacle of a President and a Senate unable to agree on the precise means to attain that which they both profess to desire."

Much of what is in this splendid study is well indicated by the author's statement in the foreword that his account is primarily an interpretation—a critical interpretation; that he does not try to tell the story in detail, but to sketch general outlines and to stress what seem at this distance to have been the most costly blunders by the negotiators; and that the book is an attempt to educate American public opinion to its responsibilities in future peace-making and international cooperation. And he does tell the story in a simple, direct, and meaningful way.

A. B. BUTTS*

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